

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285
et al. :
Plaintiffs :
: Washington, D.C.
V. : Tuesday, October 23, 2007
:
DIRK KEMPTHORNE, Secretary :
of the Interior, et al. :
:
Defendants : MORNING SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 8
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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EXHIBITS

NUMBER ADMITTED

(No Exhibits Moved into Evidence.)

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PROCEEDINGS

1
2 THE COURT: Good morning, everybody. Good morning,
3 Mr. Dorris. Whenever you're ready, Mr. Dorris.
4 MR. DORRIS: Thank you, Your Honor.
00:00:47 5 **CONTINUED DIRECT EXAMINATION OF PAUL HOMAN**
6 BY MR. DORRIS:
7 Q. Good morning, Mr. Homan. Yesterday when we broke, we were
8 looking at Plaintiffs' Exhibit 575, and page 10 of that exhibit,
9 page number eight of the Arthur Andersen audit that was
00:01:05 10 furnished in 1990 for the years that we've identified in the
11 late '80s. And we were looking at the language toward the
12 bottom of the page - we'll bring that up - dealing with matters
13 there.
14 Let me direct your attention to a statement, and this
00:01:25 15 is under item number three, "Accounting systems and material
16 internal control weaknesses." And if you'll look down about
17 five or six lines, do you see a sentence that starts, "Certain
18 of these internal control weaknesses"?
19 A. Yes.
00:01:46 20 Q. It says, "Certain of these internal control weaknesses are
21 so pervasive and fundamental as to render the accounting systems
22 unreliable."
23 Now, we're not going to look at the 16 specific items
24 that they reference there, but what did you find when you came
00:02:11 25 in as special trustee in terms of this statement, not just of

<p>1538</p> <p>1 Arthur Andersen, but what you found there at the department?</p> <p>2 A. In terms of internal control --</p> <p>3 Q. Yes, sir.</p> <p>4 A. -- weaknesses?</p> <p>00:02:25 5 Internal controls in this instance, and in the instance</p> <p>6 that I found when I was special trustee, in my due diligence for</p> <p>7 the strategic plan really involved control over the Trust</p> <p>8 accounting and asset management systems, which I was chartered</p> <p>9 by the Reform Act to reform. And that includes accounting</p> <p>00:02:49 10 policy, accounting practices, and the recordkeeping aspects of</p> <p>11 any Trust account.</p> <p>12 Q. Now, if we'll look -- and I think we looked at the next page</p> <p>13 here in this report yesterday. It's a continued list of</p> <p>14 specific items. And if we'll go to the end of that list on the</p> <p>00:03:13 15 next page, so that we're now at page 10 of this report, it's</p> <p>16 page 12 of the exhibit. And would you focus on the paragraph</p> <p>17 just below paragraph P, toward the top of the page?</p> <p>18 And it states, "As a result of the material weaknesses</p> <p>19 and internal controls referred to above, it is not possible to</p> <p>00:03:36 20 determine whether certain financial elements reflected in the</p> <p>21 accompanying financial statements are fairly stated and</p> <p>22 presented."</p> <p>23 You indicated yesterday that this was a qualified</p> <p>24 audit.</p> <p>00:03:49 25 A. Yes.</p>	<p>1540</p> <p>1 Fund Management was required to keep its books in accordance</p> <p>2 with GAAP, and it was required to have an independent outside</p> <p>3 audit in accordance with GAS.</p> <p>4 And so I received the first audit in my capacity as the</p> <p>00:05:41 5 manager of the Office of Trust Fund Management.</p> <p>6 Q. Good. Let's look at that. It's in the administrative</p> <p>7 record as Bates document 66-5. And we'll start looking at page</p> <p>8 two.</p> <p>9 So we're looking at administrative record, Bates page</p> <p>00:05:57 10 number 66-5-2, and is this the audit that you were just</p> <p>11 referring to from Griffin in December of 1996 for the Statement</p> <p>12 of Assets and Trust Fund Balances at September 30, 1995 for the</p> <p>13 Office of Trust Funds Management?</p> <p>14 A. Yes, it is.</p> <p>00:06:21 15 Q. Now, let's look over, it would be Bates page four, we'll</p> <p>16 skip the table of contents. And if you would bring the top of</p> <p>17 this document up so we're at 66-5-4. And this is a December 13,</p> <p>18 1996 document from the Office of the Inspector General, and it's</p> <p>19 to the special trustee. At this time, was that you?</p> <p>00:06:48 20 A. Yes.</p> <p>21 Q. So you were the one that received this report. Why is it</p> <p>22 coming from the Office of the Inspector General?</p> <p>23 A. The Office of the Inspector General conducts separate</p> <p>24 investigations and et cetera for any audit deficiencies</p> <p>00:07:08 25 identified that may involve fraud or some other defect in the</p>
<p>1539</p> <p>1 Q. Is this a confirmation or an indication that it is?</p> <p>2 A. Yes, it is, in accounting terms.</p> <p>3 Q. Now, Arthur Andersen audited, you said, I think for</p> <p>4 four years. And this is the first, as we saw yesterday, as you</p> <p>00:04:08 5 came in -- and then there was a break in terms of audits. Is</p> <p>6 that correct?</p> <p>7 A. Yes, that's correct.</p> <p>8 Q. And then when you came in as special trustee, there was an</p> <p>9 audit done, I think you said by Griffin & Company. Do you</p> <p>00:04:22 10 recall that?</p> <p>11 A. Yes, an audit of the Office of Trust Fund Management.</p> <p>12 Q. So now you just said an audit of the Office of Trust Fund</p> <p>13 Management. The audits we just looked at of Arthur Andersen</p> <p>14 were audits of what?</p> <p>00:04:35 15 A. They were audits, as I testified yesterday, of the Bureau of</p> <p>16 Indian Affairs, which at that time included the functions of the</p> <p>17 Office of Trust Fund Management.</p> <p>18 Subsequent to 1991, it was separated out from the</p> <p>19 bureau.</p> <p>00:04:58 20 Q. Okay. So now when we go and look at the Griffin audits,</p> <p>21 we're actually looking at an audit of the Office of Trust Fund</p> <p>22 Management as opposed to BIA?</p> <p>23 A. Yes. And the Griffin audit, which was the first audit</p> <p>24 performed, was done because it was required by the 1994 Reform</p> <p>00:05:20 25 Act. As a result of the 1994 Reform Act, the Office of Trust</p>	<p>1541</p> <p>1 account reconciliation and verification process.</p> <p>2 Q. Okay. And so the audit actually comes to the Office of</p> <p>3 Inspector General, and then they forward it on to you?</p> <p>4 A. Yes.</p> <p>00:07:24 5 Q. Okay. So this is then the cover memo where the Office of</p> <p>6 Inspector General gives you an overview of what the report says</p> <p>7 that's attached?</p> <p>8 A. That is correct.</p> <p>9 Q. Let's look at that, then. The first paragraph, just to</p> <p>00:07:39 10 confirm that they are forwarding to you the Griffin & Associates</p> <p>11 audit. Do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And then at the last paragraph on this page, and that</p> <p>14 confirms again what you indicated earlier about this is the</p> <p>00:07:54 15 first audit since 1990. Is that correct?</p> <p>16 A. That is correct.</p> <p>17 Q. So this now is where Arthur Andersen left off in 1990, and</p> <p>18 Griffin picks up in '95, though we're really talking about BIA</p> <p>19 was being audited by Andersen, and OTFM is being audited by</p> <p>00:08:16 20 Griffin?</p> <p>21 A. Right.</p> <p>22 Q. Now let's look at the next page. So we're at 66-5-5. And</p> <p>23 look at the small paragraph in the middle of the page that</p> <p>24 begins, "The independent public accountant's report on the</p> <p>00:08:33 25 internal control structure contained 16 recommendations to</p>

<p>1542</p> <p>1 address four material weaknesses, six reportable conditions, and</p> <p>2 six advisory comments as follows." And then they go on to</p> <p>3 summarize those.</p> <p>4 Let's look at those briefly, at the first one. But you</p> <p>00:08:52 5 notice they're talking about 16 recommendations, and various</p> <p>6 weaknesses and conditions and comments. And I think we saw from</p> <p>7 the Arthur Andersen audit that there were 16 individual items</p> <p>8 that they addressed.</p> <p>9 We're now looking at the paragraph that starts, "The</p> <p>00:09:10 10 four material internal control weaknesses." Would you take a</p> <p>11 moment and review that to yourself, please, sir?</p> <p>12 A. (Witness complies.) Yes.</p> <p>13 Q. And you were the one that was receiving this document. What</p> <p>14 did you as special trustee at this time understand you were</p> <p>00:09:46 15 being told by the independent auditor, Griffin, with respect to</p> <p>16 the Office of Trust Fund Management and the ability to manage</p> <p>17 those Trust funds?</p> <p>18 A. I found the conditions there, by my own due diligence, to be</p> <p>19 equivalent to the general opinions of Griffin. And they</p> <p>00:10:10 20 discussed with me and my staff prior to the issuance of the</p> <p>21 audit, to give us an opportunity to respond to the audit</p> <p>22 deficiencies, and essentially I agreed that the staffing was</p> <p>23 inadequate, the financial resources attributed to the Office of</p> <p>24 Trust Fund Management was inadequate, and essentially the Trust</p> <p>00:10:36 25 accounting system had defects dating over decades that made the</p>	<p>1544</p> <p>1 Q. Then is this then the Office of Inspector General's summary</p> <p>2 of the audit report that is attached to it?</p> <p>3 A. Yes.</p> <p>4 Q. Now, at this point in time, then, did Griffin continue to do</p> <p>00:12:28 5 audits such as this each year while you were still special</p> <p>6 trustee?</p> <p>7 A. Yes, they did.</p> <p>8 Q. And were the results of that audit -- how did that compare</p> <p>9 to what we see here?</p> <p>00:12:40 10 A. As I recall, they were qualified during those years, which</p> <p>11 would have been '96, '97, and '98, for the same reasons that are</p> <p>12 set forth in this report.</p> <p>13 Q. And then at some point after you left, KPMG became the</p> <p>14 auditor for the Office of Trust Fund Management. And have you</p> <p>00:12:59 15 reviewed the most recent audit from KPMG?</p> <p>16 A. I reviewed all of the audits that were publicly available,</p> <p>17 but paid particular attention to the most recent one, 2006.</p> <p>18 Q. Let's look at that. It is in the administrative record as</p> <p>19 document 60-2. And if we'll look at the first page of it. So</p> <p>00:13:24 20 it's administrative record Bates page 60-2-1.</p> <p>21 And this is then the audit for fiscal year 2006/2005.</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. And if we will look at Bates page two of this document. And</p> <p>00:13:47 25 at the top, this then is a similar cover memo from the Office of</p>
<p>1543</p> <p>1 accounting systems unreliable.</p> <p>2 Q. I think there's a difference in pronunciation. Did you just</p> <p>3 say -- I would call it decades, and you said it was decades?</p> <p>4 A. Well, decades.</p> <p>00:10:57 5 Q. But we're talking about the same thing?</p> <p>6 A. I guess.</p> <p>7 Q. Okay. Now, you notice at the bottom of that paragraph, it</p> <p>8 talks about the accountant's report not containing</p> <p>9 recommendations because there was going to be a strategic plan</p> <p>00:11:13 10 for the Office of the Special Trustee. Are you familiar with</p> <p>11 that?</p> <p>12 A. Yes.</p> <p>13 Q. And was that something that you were preparing and putting</p> <p>14 together?</p> <p>00:11:20 15 A. Yes, I was required by the Reform Act to put together a</p> <p>16 strategic plan to reform the Trust accounting systems and the</p> <p>17 Trust asset management systems, and the other deficiencies that</p> <p>18 were identified in prior audits and the like.</p> <p>19 Q. Okay. Now, if we'll look at the next paragraph of the IG</p> <p>00:11:43 20 summary of the Griffin report, it talks about the six</p> <p>21 nonmaterial reportable conditions. And then on the next page,</p> <p>22 the paragraph dealing with the internal control comments.</p> <p>23 MR. DORRIS: The top part of that, please. And then</p> <p>24 the next.</p> <p>00:12:10 25 BY MR. DORRIS:</p>	<p>1545</p> <p>1 Inspector General to the special trustee for American Indians,</p> <p>2 dated December 14, 2006. Of course, you weren't -- you were not</p> <p>3 the one that received this memo, but you have reviewed it?</p> <p>4 A. Yes.</p> <p>00:14:07 5 Q. Now let's look down toward the bottom of that page at the</p> <p>6 results of the independent audit. And let me let you look at</p> <p>7 that for a second.</p> <p>8 A. Yes.</p> <p>9 Q. Looking, after the first paragraph, at the next paragraph at</p> <p>00:14:29 10 the bottom of the page, it indicates, "In addition, inadequacies</p> <p>11 in certain Department of Interior Trust-related systems and</p> <p>12 processes made it impracticable to extend auditing procedures</p> <p>13 sufficiently to satisfy auditors as," and then we go over to the</p> <p>14 next, "the fairness of Trust fund balances. KPMG identified one</p> <p>00:14:53 15 reportable condition related to internal controls over financial</p> <p>16 reporting: Reliance on processing of Trust transactions at the</p> <p>17 Bureau of Indian Affairs and unresolved financial reporting</p> <p>18 matters from prior periods."</p> <p>19 Can you explain for us, where it's talking about the</p> <p>00:15:18 20 processing of Trust transactions at the Bureau of Indian</p> <p>21 Affairs, how that happens inside the Department of Interior with</p> <p>22 respect to the Office of Trust Fund Management and then the BIA?</p> <p>23 MR. QUINN: Objection, Your Honor. Foundation. I</p> <p>24 don't believe this witness established knowledge of current</p> <p>00:15:39 25 operations.</p>

<p>1546</p> <p>1 THE COURT: Let's see if the witness can answer the</p> <p>2 question.</p> <p>3 A. What I believe that means is the same that it meant in 1996,</p> <p>4 7, 8, and 9; and that is that up until 1999, at least, to my</p> <p>00:16:01 5 knowledge and as stated in the audit reports that I reviewed,</p> <p>6 the bureau had no accounts receivable system.</p> <p>7 THE WITNESS: The bureau, Your Honor, manages the</p> <p>8 assets. It lists the assets; it contracts for the lease of</p> <p>9 those assets, or invests those assets; it collects payments from</p> <p>00:16:30 10 those lease revenues and oil and gas revenues or timber</p> <p>11 contracts and land contracts; and then it passes that through to</p> <p>12 the Office of Trust Fund Management.</p> <p>13 A. I installed a new system there called TFAS, Trust Fund Asset</p> <p>14 Management -- or Accounting System, that was a commercial grade</p> <p>00:16:54 15 while I was there. So while I was there, we were able to</p> <p>16 account for every nickel that came in from the bureau; some --</p> <p>17 most of it passes through to account holders, but in connection</p> <p>18 with minor accounts or per capita accounts, in some instances it</p> <p>19 is invested by that TFAS system, which is operated by an outside</p> <p>00:17:20 20 servicer, and has passed all of the audits when I was there and</p> <p>21 up to the present, to my knowledge.</p> <p>22 What isn't audited and what can't be audited is the</p> <p>23 bureau's part of this. Up until 1999, at least - and according</p> <p>24 to these reports, it still does not have an adequate accounts</p> <p>00:17:42 25 receivable system which is able to trace a payment back to a</p>	<p>1548</p> <p>1 they've observed. And the heading is "Reliance on Processing of</p> <p>2 Trust Transactions At the Bureau of Indian Affairs and</p> <p>3 Unresolved Financial Reporting Matters From the Prior Periods."</p> <p>4 Do you see that?</p> <p>00:19:39 5 A. Yes.</p> <p>6 Q. And let me ask this question as we get ready to go through</p> <p>7 some of the items here: Are most of the items that we saw from</p> <p>8 Arthur Andersen's report in the late 1980's, and Griffin's</p> <p>9 reports starting in the mid 1990's, is that much the same</p> <p>00:20:01 10 problems that are being addressed here by KPMG?</p> <p>11 A. Substantially the same.</p> <p>12 Q. All right. Now, let's look at the second paragraph under</p> <p>13 the condition here. And it's talking about the "financial</p> <p>14 information systems and internal control procedures," and</p> <p>00:20:25 15 talking about "suffered historically from a variety of system</p> <p>16 and procedural internal control weaknesses."</p> <p>17 Is that what you were talking about from your own due</p> <p>18 diligence of having looked at these problems going back decades?</p> <p>19 A. Yes.</p> <p>00:20:39 20 Q. Let's look at some of the specific items starting at the</p> <p>21 next paragraph. Let me give you a moment to look at that. It's</p> <p>22 the paragraph, for the record, that begins, "The regional and</p> <p>23 agency offices."</p> <p>24 A. (Witness complies.)</p> <p>00:21:05 25 Q. And this is then where the auditor is getting ready to start</p>
<p>1547</p> <p>1 lease - in some cases, it does not have copies of past leases.</p> <p>2 And without that kind of a system, you are unable to</p> <p>3 tell whether the lessee is paying the correct contract amount.</p> <p>4 He may be making a partial payment, he may be past due on</p> <p>00:18:00 5 payments, and there's no way to verify that from an audit</p> <p>6 standpoint. Therefore, you can't certify the beginning balance</p> <p>7 in any of these accounts.</p> <p>8 When these accounts were passed from the bureau to the</p> <p>9 Office of Trust Fund Management in the 1999, like any private</p> <p>00:18:21 10 trustee, the Office of Trust Fund Management -- or the trustee</p> <p>11 is compelled to certify the ownership information, the asset</p> <p>12 information, the valuations of those assets, and a cash balance,</p> <p>13 if any, and then account for the receipts and disbursements</p> <p>14 coming through.</p> <p>00:18:40 15 They can do that now in the Office of Trust Fund</p> <p>16 Management. But to my knowledge, they were not doing that in</p> <p>17 the Bureau of Indian Affairs, at least through 1999.</p> <p>18 BY MR. DORRIS:</p> <p>19 Q. Now let's look over at the part of the audit report itself,</p> <p>00:18:54 20 and I'm going to direct us to a page, Bates page 60-2-34. That</p> <p>21 is a portion of the audit report that was attached to the memo</p> <p>22 we were just looking at that is in the AR.</p> <p>23 And if we'll focus up at the top there at that first</p> <p>24 heading, where it talks about -- this is then where the auditors</p> <p>00:19:22 25 in their own words describe this reportable condition that</p>	<p>1549</p> <p>1 listing problems. Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. Now, before we look at that, it talks about the regional and</p> <p>4 agency offices of BIA. From when you were special trustee, did</p> <p>00:21:22 5 you gain some familiarity with differences as to how the various</p> <p>6 regions and offices would handle the accounting or the</p> <p>7 management of the Trust funds?</p> <p>8 A. Yes. Originally, when I joined the office as special</p> <p>9 trustee, I did not have management responsibility over the</p> <p>00:21:45 10 Office of Trust Fund Management. The Secretary asked me to</p> <p>11 undertake that because of certain managerial difficulties in the</p> <p>12 BIA.</p> <p>13 So about one year after I joined, and I believe it was</p> <p>14 sometime in 1996, he asked me to take over as the manager of</p> <p>00:22:04 15 OTFM. So I then had direct responsibility for that aspect of</p> <p>16 the accounting system.</p> <p>17 What this is referring to are the regional agency</p> <p>18 offices, which are separated out from the Office of Trust Fund</p> <p>19 Management. The Office of Trust Fund Management is essentially</p> <p>00:22:26 20 like a branch office of a bank, and it collects the monies</p> <p>21 coming from the bureau, and then distributes it or invests it</p> <p>22 according to the Trust corpus, or the Trust instructions.</p> <p>23 Q. Now, did you find that there were differences between</p> <p>24 various agencies and regional offices as to how they handled</p> <p>00:22:56 25 their books from agency to agency?</p>

<p>1550</p> <p>1 A. Yes, there was no consolidated accounting for the Trust</p> <p>2 assets. According to the GAO audits, they did not know the</p> <p>3 total population of the assets under management. There were</p> <p>4 breaks in the chain of title, for certain of their assets, which</p> <p>00:23:23 5 were never audited.</p> <p>6 And they were relying on a defective system, in my</p> <p>7 view, in what is called the Integrated Resource Management</p> <p>8 System, IRMS --</p> <p>9 THE WITNESS: Which I'm sure you're familiar with by</p> <p>00:23:40 10 now, Your Honor.</p> <p>11 BY MR. DORRIS:</p> <p>12 Q. All too familiar with, I'm sure.</p> <p>13 A. In my due diligence, I looked back. IRMS was out of balance</p> <p>14 with the trust fund accounting system for every year after it</p> <p>00:23:53 15 was organized in 1972 through 1997.</p> <p>16 When the Office of Trust Fund Management received its</p> <p>17 first audit, the bureau -- or excuse me, the Department of</p> <p>18 Interior started taking the trust fund asset -- or excuse me,</p> <p>19 accounting system's numbers rather than IRMS because they were</p> <p>00:24:19 20 audited and the others were not.</p> <p>21 To my knowledge, those adjustment differences during</p> <p>22 that period were a cumulative net \$105 million that have never</p> <p>23 been reconciled; at least, they weren't up until the time I</p> <p>24 left, nor could they be, because a good many of the records had</p> <p>00:24:38 25 been destroyed prior to 1985, as previous people have testified</p>	<p>1552</p> <p>1 A. It certainly doesn't look like it.</p> <p>2 Q. Now let's look at the next paragraph, B. And we're still on</p> <p>3 Bates page 60-2-34, talking about accounts receivable. And</p> <p>4 would you take a moment and review that?</p> <p>00:26:36 5 A. (Witness complies.) Yes.</p> <p>6 Q. You've already talked a little bit about accounts receivable</p> <p>7 and having accounts receivable programmed. Was there an</p> <p>8 accounts receivable program in place when you became special</p> <p>9 trustee at BIA?</p> <p>00:26:57 10 A. No. No, there was not. And that is one of the audit</p> <p>11 exceptions that was mentioned in the Griffin audit report: No</p> <p>12 accounts receivable system.</p> <p>13 THE WITNESS: Also in connection with my due diligence,</p> <p>14 Your Honor, in connection with my strategic plan, I was given</p> <p>00:27:16 15 the opportunity to have -- to employ an outside contractor to</p> <p>16 look at the integrated -- or IRMS system, as well as the</p> <p>17 accounts receivable system. I personally made 22 -- over 20</p> <p>18 trips to the reservations and the various regional offices, and</p> <p>19 personally inspected their recordkeeping processes and their</p> <p>00:27:40 20 accounts receivable systems.</p> <p>21 Almost to a person -- one of the outside contractors</p> <p>22 described their information systems of the 12 area offices as</p> <p>23 12 islands of information without a ferry in between. He was an</p> <p>24 Englishman.</p> <p>00:28:03 25 The Englishman also came back -- when I came into the</p>
<p>1551</p> <p>1 here, the electronic records.</p> <p>2 Q. Mr. Homan, let's look at some of the items that the auditor</p> <p>3 talks about here. Because we want to see if this audit, as of</p> <p>4 December of 2006, reflects some of the same problems that you</p> <p>00:25:03 5 saw when you were there as special trustee.</p> <p>6 Let's look at item A, "Trust systems."</p> <p>7 MR. DORRIS: And can we just pull that whole paragraph</p> <p>8 up? Oh, thank you.</p> <p>9 BY MR. DORRIS:</p> <p>00:25:13 10 Q. And it says -- the first sentence in this paragraph is, "BIA</p> <p>11 had not consistently implemented automated systems for tracking</p> <p>12 and processing activities of the Indian Trust assets." It goes</p> <p>13 on down, indicating "BIA has developed an automated system for</p> <p>14 certain activities, and completed the first phase of the</p> <p>00:25:36 15 roll-out in September of 2006."</p> <p>16 And then it's talking about something coming up in</p> <p>17 September 2007, and it concludes, "This situation increases the</p> <p>18 risk that transactions are recorded inaccurately and untimely."</p> <p>19 At the time that you left in 1999, had BIA implemented</p> <p>00:25:59 20 a system-wide automated system for all of the agency offices</p> <p>21 that was being uniformly run by them?</p> <p>22 A. No.</p> <p>23 Q. And at least from what you can tell from this description,</p> <p>24 had they accomplished it, at least as of the time of this report</p> <p>00:26:18 25 in December 2006?</p>	<p>1553</p> <p>1 Office of Trust Fund Management, there was one computer in 110</p> <p>2 offices. We established, and the bureau gave out, some</p> <p>3 state-of-the-art computers at the time. And the outside</p> <p>4 contractor said they can't account for them, that a lot of them</p> <p>00:28:25 5 have taken a walk.</p> <p>6 A. At any rate, that tells you the state of the accounts</p> <p>7 receivable system as I found it in 1997. This -- apparently</p> <p>8 it's been improved, but it's still having difficulties.</p> <p>9 BY MR. DORRIS:</p> <p>00:28:42 10 Q. Thank you. Let's look at the next that deals with probate</p> <p>11 backlog. We've not talked about that before here, either</p> <p>12 yesterday or today as you've talked. And I would ask you to</p> <p>13 read that to yourself, paragraph C, "probate backlog."</p> <p>14 A. (Witness complies.) I understand it, yes.</p> <p>00:29:18 15 Q. Okay. Now let me -- I'm not asking about this audit report</p> <p>16 now. I'm asking about while you were special trustee.</p> <p>17 A. I understand that.</p> <p>18 Q. What did you find to be the situation with probate and</p> <p>19 probate backlog when you were special trustee?</p> <p>00:29:32 20 MR. QUINN: Your Honor, I'm going to object to this</p> <p>21 question and line of questions regarding probate. There's no</p> <p>22 disclosure in this expert's expert report, a remark about</p> <p>23 opinion concerning probate, or any indication of testimony</p> <p>24 concerning probate in their disclosure.</p> <p>00:29:47 25 THE WITNESS: May I respond to that?</p>

<div>1554</div> <div> <p>1 THE COURT: No, but I'll hear your answer to the</p> <p>2 question.</p> <p>3 BY MR. DORRIS:</p> <p>4 Q. I think that's an indication for you to go ahead and answer</p> <p>00:29:54 5 the question.</p> <p>6 A. All right.</p> <p>7 THE WITNESS: Your Honor, my due diligence and the</p> <p>8 actual probate backlog is contained in my strategic plan, which</p> <p>9 was an exhibit in my last testimony. So in that testimony is a</p> <p>00:30:10 10 list of the so-called audit and other exceptions we found in</p> <p>11 connection with my due diligence look at the Office of Trust</p> <p>12 Fund Management.</p> <p>13 A. As I recall, at that time there were over 6,000 cases</p> <p>14 backlogged in the probate system, and in some cases those cases</p> <p>00:30:33 15 were over four years old.</p> <p>16 In my subsequent look at the information that was</p> <p>17 provided in 2003 --</p> <p>18 THE COURT: You think four years is old for a case?</p> <p>19 THE WITNESS: Yes. On average, in some cases.</p> <p>00:30:50 20 A. Now, that was to be resolved in the I-level implementation</p> <p>21 plan under the Secretary's watch. He made that comment. His</p> <p>22 watch ended at the end of the year 2000 when the administration</p> <p>23 changes.</p> <p>24 Now I see that they still have a backlog, and they're</p> <p>00:31:09 25 going to be resolving these issues by September 2009. So</p> </div>	<div>1556</div> <div> <p>1 look at that for a moment.</p> <p>2 A. (Witness complies.) Yes.</p> <p>3 Q. And this is addressing BIA not consistently performing</p> <p>4 reviews over active supervised accounts, or maintaining</p> <p>00:33:44 5 documentation regarding them. Was that a problem when you were</p> <p>6 special trustee?</p> <p>7 A. That was essentially the issue I just identified, where the</p> <p>8 superintendents often made disbursement and receipt decisions</p> <p>9 for the trustee, particularly minors, that were not sufficiently</p> <p>00:34:01 10 documented.</p> <p>11 Q. Let's look at the next paragraph, where the accountant</p> <p>12 concludes that "The presence of these internal control</p> <p>13 weaknesses directly impacts OST's ability to process Trust</p> <p>14 transactions on behalf of Trust beneficiaries, and to provide</p> <p>00:34:19 15 accurate information to account holders, due to the</p> <p>16 interrelationship between BIA and OST.</p> <p>17 And as of this report of December 1996 -- excuse me,</p> <p>18 2006, is this the same state that you found when you were</p> <p>19 special trustee in the late 1990's?</p> <p>00:34:39 20 A. Yes. And for all the reasons I have suggested, I was</p> <p>21 confident when I left the Office of the Special Trustee that the</p> <p>22 Office of Trust Fund Management could account for every nickel</p> <p>23 coming in. But I didn't know whether those nickels should have</p> <p>24 been dollars or dimes or zero.</p> <p>00:35:00 25 And I was confident that we were investing those at</p> </div>
<div>1555</div> <div> <p>1 nine years have passed.</p> <p>2 BY MR. DORRIS:</p> <p>3 Q. But tie, very briefly if you can, how a probate backlog</p> <p>4 affects the distribution of Trust income.</p> <p>00:31:26 5 A. Normally in a bank or private sector, trustee circumstances</p> <p>6 when somebody dies and the account balances and assets go into</p> <p>7 probate, the trustee is not allowed to disburse funds except</p> <p>8 under a court order, and usually on the request of a guardian.</p> <p>9 If it's four years old, they will usually hold it in suspense</p> <p>00:32:02 10 until the court orders a distribution.</p> <p>11 It has been the practice, at least up until the time I</p> <p>12 left, of the regional offices, who act as surrogate guidelines</p> <p>13 for minors in particularly (sic), to distribute funds based on</p> <p>14 need, without sufficient documentation. And when the probate is</p> <p>00:32:28 15 finally finished, there's no reconciliation going back to see</p> <p>16 that those disbursements essentially were to the right heir.</p> <p>17 So the balances that are set forth from the closing of</p> <p>18 one bank to the heir of those assets cannot be certified by the</p> <p>19 trustee, and that's one of the continuing problems that the</p> <p>00:32:54 20 bureau has had in the 20th century.</p> <p>21 Q. Let's look over --</p> <p>22 A. I'm not prepared to say what's happening in the 21st</p> <p>23 century.</p> <p>24 Q. Let's look over at Bates page 35. At the top of the page it</p> <p>00:33:06 25 talks about "Supervised and restricted accounts." And let you</p> </div>	<div>1557</div> <div> <p>1 interest up to a commercial grade, but we weren't to disburse it</p> <p>2 because of the condition of the ownership records and the</p> <p>3 probate backlog. We were never sure we were disbursing it to</p> <p>4 the right trustee beneficiary.</p> <p>00:35:22 5 Q. Let's look at the next paragraph here in the audit report.</p> <p>6 And it talks about, that there's "several significant financial</p> <p>7 reporting differences from prior periods not being resolved."</p> <p>8 Do you see that?</p> <p>9 A. Yes.</p> <p>00:35:39 10 Q. And it begins to list some of these prior differences.</p> <p>11 Let's look at the next one under this that deals with lack of</p> <p>12 reliable IIM balance.</p> <p>13 And this is something that you referred to previously</p> <p>14 in your testimony, where there were items that were out of</p> <p>00:36:01 15 balance?</p> <p>16 A. Yes. In my due diligence, as also listed in my special --</p> <p>17 or the strategic plan of 1997, we had general ledger differences</p> <p>18 dating to the time when the U.S. Treasury passed all of the</p> <p>19 accounting on to the Bureau of Indian Affairs.</p> <p>00:36:28 20 Before 1971, they kept duplicate accounts, so you could</p> <p>21 have a check and balance between the U.S. Treasury account and</p> <p>22 the bureau's accounting systems. In 1971, the government made</p> <p>23 the decision to vest all of that into the Bureau of Indian</p> <p>24 Affairs.</p> <p>00:36:52 25 When those transfers were made, there were general</p> </div>

<div>1558</div> <div> <p>1 ledger differences, as I recall, over 70 million net, between</p> <p>2 the accounts in 1971, cash balances, essentially of the</p> <p>3 U.S. Treasury Department, and the Bureau of Indian Affairs.</p> <p>4 So they've never been reconciled. That money belongs</p> <p>00:37:18 5 to somebody, and it was having to do with either the Tribal or</p> <p>6 the individual Indian accounts.</p> <p>7 So they've been out of balance. And as I said,</p> <p>8 subsequent to that, according to a document I've seen in</p> <p>9 connection with this and the throughput study, the IRMS has been</p> <p>00:37:42 10 out of balance with the TFAS account to the tune of 105 million</p> <p>11 net from 1997, every year -- or excuse me, from 1972 to 1997.</p> <p>12 None of those differences, as I recall the footnotes, said it</p> <p>13 was due to missing records and undocumented receipts and</p> <p>14 disbursements.</p> <p>00:38:06 15 THE COURT: Now, is that 70 million and that</p> <p>16 105 million, is that the same money, or do those two differences</p> <p>17 total 175 million?</p> <p>18 THE WITNESS: No, the 70 million has to do with the net</p> <p>19 differences between the ending balance. So they took one</p> <p>00:38:23 20 balance or the other. And then subsequent to that, it's another</p> <p>21 105 million, at least.</p> <p>22 BY MR. DORRIS:</p> <p>23 Q. And you've talked about those differences. And would you</p> <p>24 look at this paragraph dealing with lack of reliable IIM</p> <p>00:38:36 25 balance? And take a moment to review that to answer this</p> </div>	<div>1560</div> <div> <p>1 it didn't bother to go back and reconcile all of the general</p> <p>2 ledger differences. And so, you know, as a government, these</p> <p>3 are pretty much debits to the general account, but they would be</p> <p>4 an insolvent situation if it were a private sector trust</p> <p>00:40:49 5 company.</p> <p>6 But those monies again belong to somebody; nobody knows</p> <p>7 who. And chances are, you know, an American Indian got benefit;</p> <p>8 but whether the right beneficiary got benefit is unknown.</p> <p>9 Q. Let's look at the top of the next page, so it's Bates page</p> <p>00:41:07 10 60-2-36. And this is one of the differences from the prior year</p> <p>11 that's noted by KPMG in this audit, dealing with Special Deposit</p> <p>12 Accounts, Tribal and IIM.</p> <p>13 My questions to you will only be asking about the IIM</p> <p>14 Special Deposit Accounts. Okay?</p> <p>00:41:27 15 A. Right.</p> <p>16 Q. Now, let me give you a moment to review that.</p> <p>17 A. (Witness complies.) Yes.</p> <p>18 Q. Mr. Homan, you see there the last sentence in that</p> <p>19 paragraph, it says, "At September 30, 2006, a significant number</p> <p>00:42:26 20 of Special Deposit Accounts continued to require resolution."</p> <p>21 Was this also a problem during the time that you were</p> <p>22 special trustee?</p> <p>23 A. Yes. Historically, and contrary to modern trust accounting,</p> <p>24 some of the Tribal funds and Special Deposit Accounts that had</p> <p>00:42:50 25 nothing to do with the individual Indian accounts were mixed</p> </div>
<div>1559</div> <div> <p>1 question. This is actually talking about where the TFAS system</p> <p>2 itself, between the control ledger balance and the subsidiary</p> <p>3 ledgers, TFAS itself does not balance.</p> <p>4 A. That's correct. And a good part of that, as I recall, is</p> <p>00:39:03 5 due to the fact that certain interest payments of the old</p> <p>6 system, the Omni system as it were, were out of balance when it</p> <p>7 was transferred to the modern system that I installed, trust</p> <p>8 fund management.</p> <p>9 So none of those -- there have been general ledger</p> <p>00:39:28 10 differences each year that have not been reconciled. I'm not</p> <p>11 familiar with these particular numbers, but I know that that was</p> <p>12 generally the case when we made that transfer to the new system.</p> <p>13 Q. I'm not sure that we've heard during this trial about the</p> <p>14 Omni system that you just referred to. Let me just ask this</p> <p>00:39:48 15 question: Was that another computerized system that was a</p> <p>16 predecessor to the TFAS system?</p> <p>17 A. It was. And there were differences, as I just outlined,</p> <p>18 between the new system and the old system that could not be</p> <p>19 reconciled.</p> <p>00:40:03 20 When I looked at -- the Omni system wasn't all that</p> <p>21 old. It was deficient in several material respects, which were</p> <p>22 identified by the auditors at the time, and it too had</p> <p>23 differences with the system it replaced. So -- none of which</p> <p>24 were ever reconciled.</p> <p>00:40:24 25 So each time the bureau changed its accounting system,</p> </div>	<div>1561</div> <div> <p>1 into the same general fund, and have never been able to sort</p> <p>2 out.</p> <p>3 I noted it in some of the throughput studies. The</p> <p>4 department had to make certain assumptions, like special</p> <p>00:43:09 5 deposits were 15 percent because of some -- maybe one year's</p> <p>6 look at that. But that has never been reconciled, either.</p> <p>7 So some of the interest on those type of funds that</p> <p>8 might have belonged to an IIM account, you know, can't be</p> <p>9 reconciled. Somebody got benefit - again, maybe the tribe,</p> <p>00:43:37 10 maybe an Indian - but not necessarily the right trust</p> <p>11 beneficiary.</p> <p>12 I'm sure that the Special Deposit Accounts I saw out</p> <p>13 there, we made an attempt to purge them from the new trust fund</p> <p>14 accounting system, but they still exist in other aspects of the</p> <p>00:43:59 15 Bureau of Indian Affairs' accounting systems, apparently.</p> <p>16 Q. Do the -- the money in the Special Deposit Accounts reflect</p> <p>17 collections into the system that have not been yet posted to</p> <p>18 individuals' accounts. Is that correct?</p> <p>19 A. In some respects. Sometimes they're just placed in there</p> <p>00:44:18 20 and used as what I call, and what our strategic due diligence</p> <p>21 call, cookie jars for inappropriate expenses by the various</p> <p>22 superintendents. I think that was well documented last time.</p> <p>23 Q. Now, one of the -- we've looked at the audits from the</p> <p>24 independent auditors that you talked about yesterday: Arthur</p> <p>00:44:44 25 Andersen, Griffin, and KPMG. Yesterday you also indicated that</p> </div>

<p>1562</p> <p>1 when you were special trustee, you also received a report from</p> <p>2 Arthur Andersen dealing with the Tribal Reconciliation Project.</p> <p>3 Do you recall that?</p> <p>4 A. Yes.</p> <p>00:44:58 5 Q. Now, before I ask you about that, that is one that dealt</p> <p>6 with the Tribal Trust funds and not the IIM funds. Is that</p> <p>7 right?</p> <p>8 A. It didn't start out that way, but that's the way it ended,</p> <p>9 yes.</p> <p>00:45:15 10 Q. Okay. This report and this process had started before you</p> <p>11 became special trustee?</p> <p>12 A. Yes. In the early 1990's, the Department of Interior took</p> <p>13 the selfsame Arthur Andersen that had done the audits from 1988</p> <p>14 to 1991, and asked them to do a GAAP audit of -- excuse me, a</p> <p>00:45:40 15 GAS audit of the receipts and disbursements dating from 1971 on</p> <p>16 to 1992, which was the end date. So essentially, that '70-'92</p> <p>17 period was covered.</p> <p>18 Immediately -- again, I received the report in 1995 of</p> <p>19 the completed -- I was the receiving official at that time. I</p> <p>00:46:10 20 had to present that to the American Indians. It showed the</p> <p>21 significant departures from GAAP, and inconclusive results,</p> <p>22 presumably because Arthur Andersen had to depart from GAAP,</p> <p>23 according to agreed-upon procedures, over 100 times, mostly</p> <p>24 because of missing records, destroyed records, lack of</p> <p>00:46:37 25 predecessor accounting systems that were accurate, and lack of</p>	<p>1564</p> <p>1 timber contracts, and oil and gas leases dating back to 1972,</p> <p>2 most of which had been destroyed. Not were missing, but were</p> <p>3 destroyed, and the like.</p> <p>4 So general results, as I remember, is that they came up</p> <p>00:48:50 5 with \$7.1 billion of general ledger entries that were not</p> <p>6 supported with sufficient documentation. \$2.4 billion had no</p> <p>7 documentation supporting the check or deposit receipt,</p> <p>8 supporting the general ledger entries. That's astounding.</p> <p>9 Q. The amounts that you just stated --</p> <p>00:49:25 10 THE COURT: Mr. Dorris, I'm going to ask you to stop</p> <p>11 for a minute. My computer has crashed here. I need to reboot</p> <p>12 it. We're all living in a new age.</p> <p>13 (OFF THE RECORD.)</p> <p>14 THE COURT: All right, Mr. Dorris. Thank you.</p> <p>00:50:11 15 MR. DORRIS: Thank you, Your Honor.</p> <p>16 BY MR. DORRIS:</p> <p>17 Q. Mr. Homan, the amounts that you just mentioned of the</p> <p>18 7.1 billion and I think it was 2.4 billion, those were dealing</p> <p>19 with the Tribal Trust funds. Correct?</p> <p>00:50:22 20 A. Yes, they were, with one exception. Some of the Osage per</p> <p>21 capita accounts were included. And the Osage, as I recall,</p> <p>22 because I had to present it to their Tribal Council, had over</p> <p>23 400 million of that 2.4 million (sic) unsupported.</p> <p>24 Q. But you were using that as an example as to -- when I asked</p> <p>00:50:47 25 you what it meant that there would be inconclusive results, that</p>
<p>1563</p> <p>1 audits.</p> <p>2 Q. Now, with respect to the Arthur Andersen report on the</p> <p>3 Tribal Trust, what did that tell you or what did you learn</p> <p>4 regarding the IIM Trust as a result of that process with Arthur</p> <p>00:47:04 5 Andersen?</p> <p>6 A. I looked into the history. And originally, the department</p> <p>7 had intended that the IIM accounts be audited under the same --</p> <p>8 by the same Arthur Andersen, according to GAAP, for the same</p> <p>9 period of time.</p> <p>00:47:20 10 Arthur Andersen, early in that process, advised the</p> <p>11 department that it would cost at least 10 times the</p> <p>12 20 million-odd in funds spent for the audit to do the IIM</p> <p>13 accounts, and would yield inconclusive results for the reasons I</p> <p>14 just mentioned. So the department decided not to do that --</p> <p>00:47:50 15 Q. Okay.</p> <p>16 A. -- for the IIM accounts.</p> <p>17 Q. When you talk about, "would yield inconclusive results,"</p> <p>18 what do you mean?</p> <p>19 A. Well, let me give you just one example of the results of</p> <p>00:48:05 20 this audit that was done by Arthur Andersen, that had</p> <p>21 disclaimers 110 times in the first few pages. Even with the</p> <p>22 limited audit they were able to do, they were not able to look</p> <p>23 at any lease contract because of the lack of an accounts</p> <p>24 receivable system.</p> <p>00:48:28 25 They had originally started to look at some regional</p>	<p>1565</p> <p>1 was an example of how the Tribal Trust --</p> <p>2 A. That's right. What can you say? I had to say to that</p> <p>3 Tribal Council, "We can't account for 400 million of the</p> <p>4 disbursements out of your account for your per capita people,</p> <p>00:51:05 5 because we have no check or no other proof of disbursement. So</p> <p>6 we don't know whether it went to the right beneficiary or not.</p> <p>7 And that can never be reconciled. There's been no look</p> <p>8 back, in any of these plans, to account for those types of</p> <p>9 historical discrepancies. The department wishes to just go</p> <p>00:51:29 10 forward from the time in 1994, but how can you not go back and</p> <p>11 verify and reconcile these astounding accounting deficiencies?</p> <p>12 Q. Now, you also talked yesterday about a file check. And you</p> <p>13 said it wasn't an audit, but it was a process that you had</p> <p>14 ordered to be undertaken.</p> <p>00:51:53 15 A. Yeah.</p> <p>16 Q. First of all, would you briefly describe what the process</p> <p>17 was that you implemented, and then we'll talk about the results.</p> <p>18 What was the process for the file check?</p> <p>19 A. Yes. As part of my due diligence for the strategic plan,</p> <p>00:52:08 20 and in parallel with the Griffin audit, I did my own examination</p> <p>21 of the audit of the Office of Trust Fund Management. I secured</p> <p>22 funds, and ordered a file check of the six-odd legal</p> <p>23 requirements for each OTFM fund.</p> <p>24 The process was that we pulled in each file from the</p> <p>00:52:36 25 regions by Fed Ex. We ran them through an assembly line</p>

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1 consisting of outside lawyers, paralegals, accountants, to check
2 each file to determine that it had the right information in it.
3 And there were astounding results, again.
4 Q. Okay. Now, can you give us a highlight of the -- what you
00:53:02 **5** said were astounding results, some insights into what you
6 found --
7 THE COURT: When did you do this?
8 THE WITNESS: I did this in 1997, as part of my
9 strategic plan. Actually, it started in 1996, Your Honor.
00:53:18 **10** BY MR. DORRIS:
11 Q. Can you give us an overview of some of the results that you
12 found?
13 A. Yes. I don't want to get into a lot of the details.
14 They're again laid out in a chart in my strategic plan that was
00:53:38 **15** introduced in Court.
16 But the highlights are following: It's the 70 million
17 in general ledger deficiencies that I outlined earlier; we found
18 over 70,000 Whereabouts Unknown accounts, with balances of
19 \$49 million, as I recall; we found 183,000 of the 790,000 open
00:53:59 **20** and closed accounts that had no tax ID or Social Security
21 number, as required by the tax codes and the Bank Secrecy Act at
22 the time.
23 THE WITNESS: The bureau, Your Honor, is required, like
24 every other trustee, to file a 1099 of income information on its
00:54:20 **25** beneficiaries. These are all American citizens, they pay taxes

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1 like everybody else. And there was 183,000 that had no identity
2 to it, attached to it. That's roughly 20 percent of the 790,000
3 we looked at.
4 There's no going back on a Whereabouts Unknown. We
00:54:44 **5** tried to reconcile that as best we could, but most of them
6 predated 199 -- excuse me, predated 1994.
7 MR. DORRIS: Your Honor, I would just note for the
8 Court that a summary of the file check is on page 28 of
9 Plaintiffs' Exhibit 575 that is Mr. Homan's report.
00:55:05 **10** BY MR. DORRIS:
11 Q. And we won't go further but to ask you this question on
12 that: As a person with your experience at the Office of the
13 Comptroller of the Currency, and then as you were actually
14 running financial institutions, including trust departments,
00:55:31 **15** what did this file check tell you about the Department of
16 Interior as a trustee for the IIM funds?
17 A. That, coupled with the audits that we just went through,
18 told me as a bank regulator, I can look you in the eye and tell
19 you it was the worst case I've ever seen in my 40 years'
00:55:53 **20** experience in the banking industry. And as a bank regulator, in
21 terms of lax accounting controls, lax internal controls, lax
22 accounting and asset management controls and systems, and
23 insufficient management and financial resources that occurred
24 over decades -- I don't know how you pronounce it; you say,
00:56:24 **25** "tomàto," I say, "tomãto" -- over decades.

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1 THE WITNESS: These, Your Honor, can't be reconciled,
2 because they are an accumulated burden that took place over
3 almost every year in the 20th century.
4 BY MR. DORRIS:
00:56:42 **5** Q. Now, you've talked about much of what you did as special
6 trustee, your due diligence and documents that you've also
7 reviewed, that brings some of that information current.
8 Would you tell the Court what your opinion is as to
9 whether these IIM accounts, an accounting that is conclusive
00:57:07 **10** with respect to IIM accounts, can be rendered?
11 MR. QUINN: Objection, Your Honor. I don't see that in
12 his disclosure, expert disclosure. And there's no foundation
13 established of this witness' current knowledge.
14 THE COURT: I thought your objection was going to be
00:57:23 **15** asked and answered. He just said that: They can't be
16 reconciled, they're an accumulated burden that took place over
17 almost every year in the 20th century.
18 MR. QUINN: I understood his testimony to be related to
19 the time he was in office, 1996, 1997.
00:57:41 **20** THE COURT: Well, it's the impossibility question.
21 Everybody in this case has an opinion on that subject. I'll
22 allow this witness to give his.
23 THE WITNESS: I think I just summed it up, Your Honor.
24 THE COURT: They were your words, Mr. Homan.
00:57:54 **25** THE WITNESS: And I can back them up.

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1 A. But generally, I don't believe that a -- what is required
2 here is that a trustee must be able to certify to the ownership
3 information, the assets, and the balances and valuation
4 information from the beginning of any trust. That has never
00:58:17 **5** been done.
6 So theoretically, if you take the strict interpretation
7 of GAAP or GAS, in my view, at least, you would have to go back
8 to the origin of each of these accounts, in some case 1887, or
9 otherwise, depending on when they were originated. Per capita
00:58:44 **10** payments or judgment accounts have come later over several
11 years.
12 When the Office of Trust Fund Management was separated
13 out, the bureau couldn't certify to those accounts. So the only
14 legitimate historical accounting - and I suggest that it not be
00:59:07 **15** done - would be a full GAS or GAAP audit dating back to the
16 origin of these accounts. That's the only way you can certify
17 the beginning balances.
18 After you certify the beginning balances, then you must
19 be able to prove as a trustee that every receipt and every
00:59:23 **20** disbursement, as long as those accounts were open, were correct.
21 That's not possible either, because of the lack of electronic
22 and checks that have been destroyed, which is the only modern -
23 modern being after World War II - way that the private sector in
24 the person of the Federal Reserve accepts as proof of
00:59:47 **25** disbursement: Front and back of a check. Just like your local

<div>1570</div> <div> <p>1 account. It can't be done, should not be done.</p> <p>2 Q. Why do you say it shouldn't be done?</p> <p>3 A. It's too expensive, and it would again prove inconclusive</p> <p>4 results. What could you tell the current account holders, that</p> <p>01:00:09 5 we think the balance is this much; we can't tie any disbursement</p> <p>6 going back before X in the 20th century to a particular asset or</p> <p>7 lease?</p> <p>8 And so you give erroneous and suspect information to</p> <p>9 the beneficiary that he can't use. How can he challenge that?</p> <p>01:00:37 10 Q. Mr. Homan, let's look back, now shifting subjects, to</p> <p>11 Plaintiffs' Exhibit 4210, page four. And if you would look down</p> <p>12 at the paragraph that begins B at the bottom. And we're back,</p> <p>13 Mr. Homan, in your report.</p> <p>14 A. Yeah.</p> <p>01:01:00 15 Q. Now, I would ask you -- you're talking here about Bank of</p> <p>16 America. And this is based on a document from the</p> <p>17 administrative record. The Bates number in the administrative</p> <p>18 record is 22-3, pages two through three. So 22-3-2 through 3,</p> <p>19 is a quote from an e-mail from Bank of America to the Department</p> <p>01:01:34 20 of Interior, that talks about what Bank of America would do if</p> <p>21 they took over a bank and then that trust department of that</p> <p>22 bank had missing documents regarding an account.</p> <p>23 Would you read to yourself the quote from that e-mail</p> <p>24 that begins on this page, and then goes over to the next page?</p> <p>01:01:52 25 A. (Witness complies.)</p> </div>	<div>1572</div> <div> <p>1 Mr. Dorris, I think government counsel are itching to</p> <p>2 stand up and say you're talking about remedy here and not the</p> <p>3 trial issues. I don't know why they're not doing that. I'm</p> <p>4 going to do it for them.</p> <p>01:04:11 5 It's an interesting -- what you're suggesting here is</p> <p>6 very interesting. It is not what we're about in this trial.</p> <p>7 Okay?</p> <p>8 MR. DORRIS: Okay. Your Honor, where I was going with</p> <p>9 this with respect to this trial was that there is a different</p> <p>01:04:27 10 approach than the approach that is being used.</p> <p>11 THE COURT: I understand that.</p> <p>12 MR. DORRIS: But I won't go any further.</p> <p>13 THE WITNESS: I understand that. But the question that</p> <p>14 this witness is now being asked to address is: What do we do</p> <p>01:04:41 15 about this?</p> <p>16 MR. DORRIS: Okay.</p> <p>17 THE COURT: And that's not the issue we're talking</p> <p>18 about in this trial, the way I see it and the way I've set it</p> <p>19 up.</p> <p>01:04:47 20 MR. DORRIS: I'll move on, Your Honor.</p> <p>21 THE COURT: Thank you.</p> <p>22 BY MR. DORRIS:</p> <p>23 Q. Would you look at Plaintiffs' Exhibit 4210, page five, in</p> <p>24 the middle of the page? It begins with paragraph C.</p> <p>01:05:04 25 MR. DORRIS: If you would show the last half of that</p> </div>
<div>1571</div> <div> <p>1 Q. And if you would look at the top of the next page, please,</p> <p>2 sir.</p> <p>3 A. (Witness complies.)</p> <p>4 MR. DORRIS: Could you keep that up and pull up the</p> <p>01:02:26 5 paragraph just underneath it, also?</p> <p>6 BY MR. DORRIS:</p> <p>7 Q. At the end there, where you've quoted the Bank of America</p> <p>8 e-mail and advice, you state, "This is the practice followed by</p> <p>9 all reasonable and prudent trustees. However, without</p> <p>01:02:50 10 explanation, the 2007 plan disregards the guidance provided by</p> <p>11 Bank of America."</p> <p>12 Can you explain that?</p> <p>13 A. Yes.</p> <p>14 THE WITNESS: First of all, Your Honor, this procedure</p> <p>01:03:03 15 is not unique to the Bank of America. It is a procedure</p> <p>16 consistent with GAAP that can be done at a reasonable cost and</p> <p>17 has been used by the government in resolving failed bank</p> <p>18 situations since 1970. It was developed, is my recollection, by</p> <p>19 the Office of the Comptroller of the Currency and the FDIC, and</p> <p>01:03:30 20 has been used in over 2000 cases since the 1970s to deal with</p> <p>21 missing records, or records that cannot be reconciled back to</p> <p>22 the beginning balance.</p> <p>23 It is also used in the private sector in bank</p> <p>24 mergers --</p> <p>01:03:49 25 THE COURT: Mr. Dorris -- excuse me, sir.</p> </div>	<div>1573</div> <div> <p>1 page, please.</p> <p>2 BY MR. DORRIS:</p> <p>3 Q. Mr. Homan, let me ask this: You talk about here that the</p> <p>4 2000 plan is flawed in other respects. And the question is,</p> <p>01:05:25 5 what are you talking about in the -- the other flaws in the 2007</p> <p>6 plan here?</p> <p>7 A. Well, first of all, as part of my opinion I stated that the</p> <p>8 only way to do this in strict conformance with GAAP and GAS is</p> <p>9 to verify the balances back to the original opening of the</p> <p>01:05:51 10 trust.</p> <p>11 So any sampling technique is inappropriate, which in my</p> <p>12 view -- not only the one suggested in 2003, but the current one.</p> <p>13 So I don't believe any sampling technique is going to satisfy</p> <p>14 anyone, and will yield inconclusive results. So I wouldn't</p> <p>01:06:12 15 spend a nickel on this.</p> <p>16 But assuming that it's going to be done or approved,</p> <p>17 then you look at the plan. And when you get to the second half</p> <p>18 of it, it qualifies it by saying that we're sacrificing</p> <p>19 completeness, accuracy, and timeliness because we don't have --</p> <p>01:06:32 20 we suspect we aren't going to get the appropriations from</p> <p>21 Congress to carry this plan out.</p> <p>22 And that's certainly been the history. They recite</p> <p>23 that they wanted 400 million, as I recall, in appropriations for</p> <p>24 the last three fiscal years, and got something close to 170.</p> <p>01:06:55 25 Now, what they estimated a few years ago to cost 400 million is</p> </div>

<div>1574</div> <div> <p>1 apparently going to be completed for a total of 271 million.</p> <p>2 127 million they've already spent. So again, they're going to</p> <p>3 get less conclusive results in any procedure along this line.</p> <p>4 I agree with Congress. I wouldn't appropriate a nickel</p> <p>01:07:23 5 for this exercise.</p> <p>6 Q. Well, let me ask you this. And I'm changing subjects</p> <p>7 slightly, but on this same topic.</p> <p>8 A. All right.</p> <p>9 Q. And I want to ask you about cost, and the cost of doing an</p> <p>01:07:36 10 accounting in a trust situation, based on your experience.</p> <p>11 Where a trustee is doing an accounting, and the cost of</p> <p>12 that is because of things the trustee has not done properly,</p> <p>13 such as not maintaining records and the like, who, from your</p> <p>14 experience in the private sector, bears the cost of that?</p> <p>01:08:01 15 MR. QUINN: Objection, Your Honor. This is asking for</p> <p>16 a legal conclusion.</p> <p>17 THE COURT: Sustained.</p> <p>18 BY MR. DORRIS:</p> <p>19 Q. Mr. Homan, let me ask you to look on the next page of your</p> <p>01:08:23 20 report. That would be Plaintiffs' 4210, item D. This is on page</p> <p>21 six, and it talks about "Key definitional issues not being</p> <p>22 adequately addressed in the plan." And you talk about a</p> <p>23 specific Deloitte & Touche document that was included in the</p> <p>24 administrative record. Do you see that?</p> <p>01:08:46 25 A. Yes.</p> </div>	<div>1576</div> <div> <p>1 A. (Witness complies.) Yes, I read it.</p> <p>2 Q. Looking at the second paragraph of this quote, it says, "The</p> <p>3 only viable option from a legal and legislative standpoint is</p> <p>4 that the historical accounting commence with the date of the</p> <p>01:11:10 5 initial allotment. Unfortunately, from a feasibility</p> <p>6 perspective, this could date back to the 1950s (sic)." Do you</p> <p>7 see that?</p> <p>8 THE COURT: 1850s.</p> <p>9 MR. DORRIS: Thank you, Your Honor. I misspoke.</p> <p>01:11:25 10 BY MR. DORRIS:</p> <p>11 Q. Do you see that?</p> <p>12 A. Yes, I do.</p> <p>13 Q. And was this something -- do you see anywhere in the 2007</p> <p>14 plan where this advice is taken into account?</p> <p>01:11:33 15 A. No.</p> <p>16 Q. Now, with respect to -- have you been involved with where</p> <p>17 trustees furnish an accounting to beneficiaries?</p> <p>18 THE COURT: I'm sorry, Mr. Dorris. When you say, "this</p> <p>19 advice taken into account," you're talking about what's on the</p> <p>01:11:56 20 screen here?</p> <p>21 THE WITNESS: Yes. The advice that "the only viable</p> <p>22 option from a legal and legislative standpoint," et cetera, that</p> <p>23 it corresponds -- and I agree with that advice, that the only</p> <p>24 way to do this is to go back to the beginning of each of these</p> <p>01:12:13 25 accounts.</p> </div>
<div>1575</div> <div> <p>1 Q. Now, this is a document in the administrative record that's</p> <p>2 document 4-2-1. And we're going to just stay here on your</p> <p>3 report, but for the record I want to indicate where it is in the</p> <p>4 record. And it's at pages, Bates pages 321 through 336 of the</p> <p>01:09:22 5 administrative record.</p> <p>6 And you have quoted from that document in a couple of</p> <p>7 spots here in your report. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Let's look at the first one coming from this report dealing</p> <p>01:09:37 10 with key definitional issues, and doing the historical</p> <p>11 accounting.</p> <p>12 At the bottom it begins, "The Court and/or Congress may</p> <p>13 expect that all beneficiaries at any point in time are owed</p> <p>14 accountings. As a result, closed accounts other than</p> <p>01:09:53 15 predecessor accounts may have to be included in the accounting."</p> <p>16 Now, Mr. Homan, with respect to trying to establish the</p> <p>17 accuracy of a beginning balance in an account for someone that's</p> <p>18 not an original allottee, how can you determine the accuracy of</p> <p>19 that balance without looking at the account prior to it?</p> <p>01:10:17 20 A. You can't. If you can't certify the beginning balance, how</p> <p>21 can you certify the ending balance that is going to be passed on</p> <p>22 to someone else?</p> <p>23 Q. And then look at the next down a little bit, the next quote</p> <p>24 from the Deloitte & Touche document. And let you review that</p> <p>01:10:42 25 for a moment.</p> </div>	<div>1577</div> <div> <p>1 THE COURT: And my question is, what am I looking at on</p> <p>2 the screen?</p> <p>3 THE WITNESS: I'm looking at the last paragraph there,</p> <p>4 Your Honor.</p> <p>01:12:20 5 THE COURT: Of what?</p> <p>6 MR. DORRIS: It's from the Deloitte & Touche document</p> <p>7 that's in the administrative record.</p> <p>8 (Simultaneous conversation.)</p> <p>9 THE COURT: I just got confused about whether I was</p> <p>01:12:34 10 looking at Deloitte, or whether I was looking at this witness'</p> <p>11 report.</p> <p>12 Go ahead.</p> <p>13 MR. DORRIS: It's the Deloitte quote that is quoted in</p> <p>14 his report. And I'm sorry for the lack of clarity, Your Honor.</p> <p>01:12:45 15 THE COURT: All right.</p> <p>16 BY MR. DORRIS:</p> <p>17 Q. Looking down further toward the bottom of this page of your</p> <p>18 report, page seven, in item E you begin quoting from a number of</p> <p>19 documents that are identified as being from the administrative</p> <p>01:13:08 20 record of Hughes & Bentzen. Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. And then it carries over to the next page.</p> <p>23 And Hughes & Bentzen were attorneys that were hired by</p> <p>24 the Department of Interior to give them advice during the</p> <p>01:13:28 25 course -- at some point in the administrative record. And</p> </div>

<div>1578</div> <div> <p>1 there's some seven different letters, opinions in the</p> <p>2 administrative record, that you reviewed. Is that right?</p> <p>3 A. Yes.</p> <p>4 Q. I want to just ask you about one of them. Well, about maybe</p> <p>01:13:57 5 two of them. On this page, it is the third one down. So we're</p> <p>6 on page eight of your report where you're quoting from a</p> <p>7 document, and it's talking about the duty of a trustee.</p> <p>8 And this is from the administrative record. It's Bates</p> <p>9 page 64-6-1. Do you see that?</p> <p>01:14:20 10 A. Yes. Yes, I do.</p> <p>11 Q. And have you been involved -- let me ask it this way: This</p> <p>12 is talking about a trustee's duty to keep full, accurate, and</p> <p>13 orderly records.</p> <p>14 A. Yes.</p> <p>01:14:32 15 Q. And from your time as special trustee, was this being done?</p> <p>16 A. No.</p> <p>17 Q. Now, let me ask this. And we can maybe save looking at some</p> <p>18 of these. From your time in both the Office of the Comptroller</p> <p>19 of the Currency, and when you were actually out involved in</p> <p>01:15:02 20 running financial institutions, were you -- when a trustee is</p> <p>21 providing an accounting to a beneficiary, what is included in</p> <p>22 that accounting?</p> <p>23 A. What is included in that accounting?</p> <p>24 Q. What is the custom and practice that you're familiar with in</p> <p>01:15:21 25 terms of what information is included in the accounting?</p> </div>	<div>1580</div> <div> <p>1 deficiency is caused, it's been what I call the 100 percent</p> <p>2 rule, since at least my memory when I joined the Office of the</p> <p>3 Comptroller in 1996, all the way through my banking career.</p> <p>4 Generally --</p> <p>01:18:06 5 MR. QUINN: Excuse me, Mr. Homan. I'm going to object</p> <p>6 for the record. First, the answer is nonresponsive; the answer</p> <p>7 is narrative, expressing an opinion outside the scope and the</p> <p>8 expert opinion disclosed in the report, and goes into irrelevant</p> <p>9 matter.</p> <p>01:18:22 10 THE COURT: That's the old immaterial, irrelevant, and</p> <p>11 inconsequential objection.</p> <p>12 MR. QUINN: I'm covering all my bases.</p> <p>13 THE COURT: Every bit of it is true, and I'm going to</p> <p>14 overrule it. I want to hear the answer.</p> <p>01:18:36 15 THE WITNESS: The answer simply is this, Your Honor:</p> <p>16 If there is a discrepancy in your checking account, and the bank</p> <p>17 cannot provide you with a copy of your check on a daily basis --</p> <p>18 this is the same requirement as in the 1994 Reform Act. On a</p> <p>19 daily basis, they can't provide you with that balance, the</p> <p>01:18:58 20 accounting rule and the regulatory rule is that they have one</p> <p>21 accounting period, which is normally 90 days, to -- these items</p> <p>22 that are unproven go into a suspense account. They can be a</p> <p>23 liability or an asset suspense account.</p> <p>24 If they can't resolve that issue, they take the loss.</p> <p>01:19:20 25 They have to, as a presumption, restore the amount that they</p> </div>
<div>1579</div> <div> <p>1 A. Well, as required by common law and Reg 9 of the OCC,</p> <p>2 Officer of the Comptroller of the Currency, when an account is</p> <p>3 opened, the trustee is compelled to validate and verify the</p> <p>4 ownership information, validate and verify the assets to be</p> <p>01:15:48 5 administered in the trust account, and validate and verify the</p> <p>6 opening balances, if they're cash, or some other evaluation for</p> <p>7 nonmarketable assets, such as an appraisal valuation and et</p> <p>8 cetera. Those are the general requirements.</p> <p>9 Since -- at least in my recollection, when it comes to</p> <p>01:16:18 10 reconciling disbursements and receipts, through the Federal</p> <p>11 Reserve payment system there are specific requirements for the</p> <p>12 checks that pass through that system that the bureau has never</p> <p>13 followed, although the U.S. Treasury must follow those.</p> <p>14 One of those is that you -- in a trust account, you</p> <p>01:16:46 15 have to maintain the checks that passed through the system. The</p> <p>16 Treasury, by design, through inappropriate retention records,</p> <p>17 has destroyed most of those checks. There's still a copy of</p> <p>18 them somewhere in the Federal Reserve system, but they're on</p> <p>19 microfiche, and it takes literally days to find one.</p> <p>01:17:17 20 The other issue is that the checks are returned not to</p> <p>21 the Bureau of Indian Affairs or to the account beneficiaries,</p> <p>22 but are mixed in with all of the other Treasury accounts --</p> <p>23 Treasury checks issued: Social Security checks, et cetera.</p> <p>24 Can't be found or retrieved.</p> <p>01:17:45 25 But in terms of who takes a loss when an accounting</p> </div>	<div>1581</div> <div> <p>1 can't prove into the account. That's been commercial law for</p> <p>2 50 years.</p> <p>3 And if the government cannot follow that kind of a</p> <p>4 procedure, which it never has, it's got a lower standard.</p> <p>01:19:48 5 BY MR. DORRIS:</p> <p>6 Q. Mr. Homan, let me ask this: Is the information that the</p> <p>7 government is talking about putting on the historical statement</p> <p>8 of accounts that it's proposing to furnish as part of the 2007</p> <p>9 plan to land-based beneficiaries, is the information they're</p> <p>01:20:06 10 talking about putting there sufficient for a beneficiary to make</p> <p>11 any meaningful judgments about his or her account, and whether</p> <p>12 the trustee has fulfilled its fiduciary duties?</p> <p>13 A. No.</p> <p>14 Q. Why do you say that?</p> <p>01:20:17 15 A. Well, as I said, they can't provide the beneficiary with a</p> <p>16 certified statement that the ownership is correct, the asset</p> <p>17 values are correct, and the balances are correct.</p> <p>18 So anything less than that is of no use, in my view, to</p> <p>19 a beneficiary or anyone else.</p> <p>01:20:42 20 Q. Thank you, Mr. Homan.</p> <p>21 MR. DORRIS: I have no further questions.</p> <p>22 THE COURT: Cross-examine?</p> <p>23 CROSS EXAMINATION</p> <p>24 BY MR. QUINN:</p> <p>01:21:04 25 Q. Good morning, Mr. Homan.</p> </div>

<p>1582</p> <p>1 A. Good morning.</p> <p>2 MR. QUINN: Good morning, Your Honor. Michael Quinn</p> <p>3 for the United States.</p> <p>4 BY MR. QUINN:</p> <p>01:21:16 5 Q. It's nice to see you again, Mr. Homan. We've spoken before,</p> <p>6 haven't we?</p> <p>7 A. For seven days, as I remember the last time.</p> <p>8 Q. That was back in 2003?</p> <p>9 A. Yeah.</p> <p>01:21:26 10 Q. In front of Judge Lamberth, in the Phase 1.5 trial?</p> <p>11 A. That's correct.</p> <p>12 Q. And I think before that trial, I may have taken your</p> <p>13 deposition. Do you remember that?</p> <p>14 A. Yes, generally.</p> <p>01:21:39 15 Q. Why don't we begin this morning, I would like to look at</p> <p>16 your -- go back a moment to your expert report that you</p> <p>17 delivered for purposes of this hearing.</p> <p>18 A. Yes.</p> <p>19 MR. QUINN: If we could put it up on the screen. This</p> <p>01:21:59 20 is plaintiffs' -- for the record, Plaintiffs' Exhibit 4210.</p> <p>21 BY MR. QUINN:</p> <p>22 Q. Do you recognize that as your expert report, sir?</p> <p>23 A. Yes. The cover page, at least.</p> <p>24 Q. Okay. And I wanted to ask you some questions more</p> <p>01:22:09 25 specifically about that in a moment.</p>	<p>1584</p> <p>1 And those documents are in my appendix as documents I relied</p> <p>2 upon.</p> <p>3 Q. Okay. Let me ask you about that before we put it up on the</p> <p>4 screen. I want to ask you a little bit about the document list</p> <p>01:23:51 5 that you appended with your expert report.</p> <p>6 And before I even get to that, I would like to ask you,</p> <p>7 have you gone back through your report and looked at it since</p> <p>8 you authored it, since you prepared it?</p> <p>9 A. Yes.</p> <p>01:24:05 10 Q. Do you have any amendments to make or corrections that you</p> <p>11 noted that you would like to put on the record this morning?</p> <p>12 A. No.</p> <p>13 Q. With respect to the list of documents that you reviewed and</p> <p>14 relied upon, could you describe how you prepared that? I'm</p> <p>01:24:23 15 trying to make certain that I understand that what you have in</p> <p>16 that list is a list of everything you looked at and considered,</p> <p>17 or just the things that you relied on for purposes of forming</p> <p>18 your opinion.</p> <p>19 A. Well, the list is as stated in my appendix. But it also</p> <p>01:24:44 20 incorporates by reference my testimony before the Court last</p> <p>21 time, which had an extensive list of documents which are</p> <p>22 included as part of this testimony.</p> <p>23 Q. But you would agree with me --</p> <p>24 A. I think there are some like 300 pages of testimony there, as</p> <p>01:25:00 25 I recall, that I filed in connection with this report.</p>
<p>1583</p> <p>1 But in answering the questions that Mr. Dorris was</p> <p>2 putting to you this morning and yesterday, and to put things a</p> <p>3 little bit into a little better time perspective, if you will,</p> <p>4 when did you become the special trustee for American Indians?</p> <p>01:22:32 5 A. In September of 1995.</p> <p>6 Q. And when did you resign that position?</p> <p>7 A. On January 7th of 1999.</p> <p>8 Q. Have you had any continuing role in advice to the Department</p> <p>9 of Interior, or as a contractor or otherwise, since you departed</p> <p>01:22:50 10 that position in 1999?</p> <p>11 A. No.</p> <p>12 Q. You did give some testimony to Congress, though. Right? In</p> <p>13 2002?</p> <p>14 A. At their request, yes.</p> <p>01:22:58 15 Q. At the time you left in 1999, there was no such thing as the</p> <p>16 Office of Historical Trust Accounting. Right?</p> <p>17 A. No.</p> <p>18 Q. That came later. Correct?</p> <p>19 A. Yes.</p> <p>01:23:14 20 Q. So sitting here today, you don't have knowledge, personal</p> <p>21 knowledge, sir, with respect to the operations, the decision</p> <p>22 making, the investigations, the research that's been undertaken</p> <p>23 by that office, do you?</p> <p>24 A. No, with the exception that I did review documents produced</p> <p>01:23:32 25 by that office in connection with the 2003 and this hearing.</p>	<p>1585</p> <p>1 Q. Right, because you had an extensive amount of testimony from</p> <p>2 the Phase 1.5 trial. Right? And you appended the entire record</p> <p>3 transcript to your report. Right?</p> <p>4 A. That's correct.</p> <p>01:25:13 5 Q. What I want to ask you is what -- for purposes of the report</p> <p>6 that you authored and rendered, for purposes of this hearing in</p> <p>7 August of 2007, did you look at the entire administrative record</p> <p>8 that was produced by the government, or only selected materials</p> <p>9 out of that administrative record?</p> <p>01:25:32 10 A. Only selected materials.</p> <p>11 Q. And those are the ones that are listed on your appendix?</p> <p>12 A. Yes. Or referred to in the body of my report and quoted.</p> <p>13 MR. QUINN: Can we go to that, I think it's Exhibit 4</p> <p>14 or attachment four? Show the cover, and zoom in so the witness</p> <p>01:25:53 15 can identify it, if you could.</p> <p>16 BY MR. QUINN:</p> <p>17 Q. Now, this is a copy of your Exhibit 4 to your report.</p> <p>18 Right?</p> <p>19 A. The cover page, looks like it.</p> <p>01:26:03 20 Q. The cover page. We're going to take this --</p> <p>21 A. All right. I will trust you --</p> <p>22 Q. We're working with the screens here. We have to go piece by</p> <p>23 piece. But for reference, in terms of the file numbers, this</p> <p>24 was filed with the Court by the plaintiffs. And at the top of</p> <p>01:26:17 25 the page there's a reference number, page 397 of 399. And your</p>

<p>1586</p> <p>1 report was about 400 pages. Right?</p> <p>2 A. Thereabouts.</p> <p>3 MR. QUINN: So if you go to the next page, please.</p> <p>4 BY MR. QUINN:</p> <p>01:26:28 5 Q. And this is the first part of your list, is that right, of</p> <p>6 what you reviewed?</p> <p>7 A. That's correct.</p> <p>8 Q. Now, in authoring your opinion and rendering your opinions</p> <p>9 today, would you say you took an independent view, an unbiased</p> <p>01:26:45 10 view?</p> <p>11 A. Yes.</p> <p>12 Q. And among the materials you relied upon, I see at number</p> <p>13 four and number five you referred to a couple of briefs filed by</p> <p>14 the plaintiffs. Is that right?</p> <p>01:27:00 15 A. Yes.</p> <p>16 Q. And you read those briefs, and apparently relied on them to</p> <p>17 one extent or another in rendering your opinion. Correct?</p> <p>18 A. Yes.</p> <p>19 Q. I don't see on your list, however, the government's response</p> <p>01:27:18 20 to those briefs. So you didn't rely on the government's -- or</p> <p>21 look at or consider the government's opinion in response?</p> <p>22 A. I read the plan, which is what I was commissioned to report</p> <p>23 on.</p> <p>24 Q. But in terms of the briefs that were filed by the plaintiffs</p> <p>01:27:29 25 that you refer to in your list, you do not identify that you at</p>	<p>1588</p> <p>1 A. Not as much as everybody else, but yes.</p> <p>2 Q. Quite a bit?</p> <p>3 A. Right. There are bigger ones.</p> <p>4 Q. Okay. Do you have any reason to doubt the competency of</p> <p>01:28:45 5 Bank of America and its commercial trust operations?</p> <p>6 A. Not -- but it's been since 1985 since I've looked at them.</p> <p>7 Q. But sitting here today, you have no to reason to --</p> <p>8 A. No.</p> <p>9 Q. I think you referred to a report by Deloitte & Touche.</p> <p>01:28:59 10 Right? Among the papers that you looked at in terms of giving</p> <p>11 your opinion?</p> <p>12 A. That's correct.</p> <p>13 Q. And describe for the record your knowledge of the firm of</p> <p>14 Deloitte & Touche. Who are they?</p> <p>01:29:11 15 A. It's a major accounting firm in the United States, one of</p> <p>16 the, used to be Big Six, I think it's now Big Four.</p> <p>17 Q. So they're one of the larger accounting firms in this</p> <p>18 country?</p> <p>19 A. Yes.</p> <p>01:29:23 20 Q. Would you have any reason to distrust or doubt statements by</p> <p>21 Deloitte & Touche?</p> <p>22 A. No.</p> <p>23 Q. And in fact, you point to some of Deloitte & Touche's</p> <p>24 statements in your opinion. Correct?</p> <p>01:29:39 25 A. That's correct.</p>
<p>1587</p> <p>1 all considered the response of the government to those briefs,</p> <p>2 did you?</p> <p>3 A. That is correct.</p> <p>4 Q. Now, in your report and on your list here, you also</p> <p>01:27:48 5 reference a number of experts that the government has hired as</p> <p>6 contractors to advise you. Right?</p> <p>7 A. Yes.</p> <p>8 Q. And you testified about some of those today. Correct?</p> <p>9 A. I quoted some of those today.</p> <p>01:28:02 10 Q. All right. And some of those are quoted in your report.</p> <p>11 Right?</p> <p>12 A. Yes.</p> <p>13 Q. Bank of America?</p> <p>14 A. Bank of America.</p> <p>01:28:07 15 Q. Okay. Bank of America, fairly big trust operation, to your</p> <p>16 knowledge?</p> <p>17 A. One of the biggest in the United States.</p> <p>18 Q. Do you know people there from your banking experience?</p> <p>19 A. Not anymore. But I examined the Bank of America when I was</p> <p>01:28:20 20 an examiner in San Francisco. I supervised it for a number of</p> <p>21 years.</p> <p>22 Q. But you would say, as an institution they have a fair amount</p> <p>23 of experience in commercial trust operations?</p> <p>24 A. I would say yes.</p> <p>01:28:33 25 Q. As much as anybody else, probably?</p>	<p>1589</p> <p>1 Q. And you also refer to -- and on this list of your</p> <p>2 relied-upon documents, you also refer to a series of legal</p> <p>3 memoranda authored and prepared by a firm of Hughes & Bentzen.</p> <p>4 Right?</p> <p>01:29:55 5 A. Yes.</p> <p>6 Q. And you read all those documents?</p> <p>7 A. I did.</p> <p>8 Q. Okay. Did you have any familiarity with Hughes & Bentzen</p> <p>9 before you read these opinions?</p> <p>01:30:06 10 A. No, but I had familiarity with the case law that they</p> <p>11 referenced from my days at the Comptroller of the Currency. And</p> <p>12 there's a report I wrote on it in connection with my 2003</p> <p>13 testimony.</p> <p>14 Q. Okay. So in your review, you didn't see anything in their</p> <p>01:30:25 15 legal memoranda that stood out as being at a great difference of</p> <p>16 opinion with what your experience had been in terms of trust?</p> <p>17 A. I think they were equivocal in some of their opinions. So I</p> <p>18 agree with the quotations that I referenced, but I don't agree</p> <p>19 with all of their opinions.</p> <p>01:30:47 20 Q. Okay. But you didn't cite anything you disagreed with in</p> <p>21 your report, did you?</p> <p>22 A. No.</p> <p>23 Q. If we could --</p> <p>24 THE COURT: If we could take a mid-morning break.</p> <p>01:31:01 25 MR. QUINN: I would be happy to do that, Your Honor.</p>

<p>1590</p> <p>1 THE COURT: And Mr. Quinn, could I see you and</p> <p>2 Mr. Dorris at side-bar, please?</p> <p>3 MR. QUINN: Sure.</p> <p>4 (Recess taken at 11:04 a.m.)</p> <p>01:44:59 5 THE COURT: Okay, Mr. Quinn. You may proceed.</p> <p>6 MR. QUINN: Thank you, Your Honor.</p> <p>7 BY MR. QUINN:</p> <p>8 Q. Mr. Homan, just before we took our recess, we were talking a</p> <p>9 little bit about your expert report and your experience since</p> <p>01:45:11 10 you had left as the special trustee for American Indians in</p> <p>11 1999.</p> <p>12 And tell me if I'm wrong, but your review of the</p> <p>13 current plan did not include a review of the entire</p> <p>14 administrative record. Is that right?</p> <p>01:45:30 15 A. Yes, that's correct.</p> <p>16 Q. So you have not considered the data completeness validation</p> <p>17 studies done by FTI Consulting and Michelle Herman?</p> <p>18 A. I was provided some part of the throughput. I'm not sure</p> <p>19 who Michelle Herman is.</p> <p>01:45:46 20 Q. Okay. So then I can take that --</p> <p>21 A. I mean, I remember her name, so I did review something that</p> <p>22 was sent to me by Michelle Herman.</p> <p>23 Q. Perhaps it was on the throughput, but not probably on data</p> <p>24 completeness validation?</p> <p>01:46:00 25 A. It would have had to have been probably the throughput.</p>	<p>1592</p> <p>1 Q. Okay. You included your testimony from 2002, right, in your</p> <p>2 expert report?</p> <p>3 A. Yes.</p> <p>4 MR. QUINN: Can we have that? Okay. All right. We'll</p> <p>01:47:57 5 come back to that.</p> <p>6 BY MR. QUINN:</p> <p>7 Q. I believe in your CV that you attached with your expert</p> <p>8 report, you identify your experience in the Office of Special</p> <p>9 Trustee under a separate category of experience. Right?</p> <p>01:48:10 10 A. Yes.</p> <p>11 Q. And I take it that your role as special trustee was a unique</p> <p>12 one in your career history?</p> <p>13 A. Well, by definition it was unique.</p> <p>14 Q. And, in fact, there aren't commercial trusts that have all</p> <p>01:48:32 15 the attributes of the IIM Trusts. Is that fair to say?</p> <p>16 A. If you -- all? No. Substantially all, yes.</p> <p>17 Q. In this case, the Trust is established by statute. Right?</p> <p>18 A. Yes.</p> <p>19 Q. The terms of the Trust are established by statute, too?</p> <p>01:48:56 20 A. Yes.</p> <p>21 Q. And here the government agency, a government agency within</p> <p>22 the Department of Interior, is acting as the trustee delegate?</p> <p>23 A. That's correct.</p> <p>24 Q. And the funding for the management of the Trust comes from</p> <p>01:49:19 25 Congressional appropriations. Correct?</p>
<p>1591</p> <p>1 Q. So in terms of forming your opinion, you have not looked at</p> <p>2 the current efforts by the Department of Interior and its</p> <p>3 contractors to analyze the IRMS data and the TFAS data for its</p> <p>4 reliability. You haven't taken that into account. Right?</p> <p>01:46:19 5 A. Only to the extent that it was provided either in the plan</p> <p>6 or in those documents.</p> <p>7 Q. Okay. And your own personal knowledge with respect to the</p> <p>8 state of Interior's systems is at least seven years old at this</p> <p>9 point?</p> <p>01:46:35 10 A. Yes. But the -- I did review the audit reports, as I --</p> <p>11 Q. But your own personal --</p> <p>12 A. -- didn't bring it up to date until 1996.</p> <p>13 Q. Excuse me, Mr. Homan. I'm just asking about your personal</p> <p>14 knowledge, not what you've read from other sources. Your</p> <p>01:46:53 15 personal knowledge ended about seven years ago. Correct?</p> <p>16 A. My personal knowledge includes what I reviewed.</p> <p>17 Q. When you were in the Office of Special Trustee, you made a</p> <p>18 proposal to Congress, correct, in terms of the strategic plan?</p> <p>19 A. Yes.</p> <p>01:47:13 20 Q. And you made a similar proposal in your testimony in 2002,</p> <p>21 or thereabouts, to Congress?</p> <p>22 A. Yes.</p> <p>23 Q. In the course of your proposals, did you propose that the</p> <p>24 department assess fees against accounts?</p> <p>01:47:33 25 A. I don't recall doing that. I may have.</p>	<p>1593</p> <p>1 A. Yes.</p> <p>2 Q. And this Trust also has another unique aspect to some</p> <p>3 extent, doesn't it, in terms of the longevity of the IIM</p> <p>4 accounts?</p> <p>01:49:35 5 A. Would you rephrase that question? I don't quite understand</p> <p>6 it.</p> <p>7 Q. I was asking you whether in terms of the Trust, this Trust</p> <p>8 is different or distinct from most commercial trusts, that the</p> <p>9 longevity of the accounts are longer than what you would</p> <p>01:49:57 10 ordinarily find in a commercial trust setting.</p> <p>11 A. Not necessarily.</p> <p>12 Q. Let's go --</p> <p>13 MR. QUINN: Do we have that up now? Okay. Could we go</p> <p>14 to his resumé? Okay. Sorry, Your Honor. This is one from his</p> <p>01:50:25 15 earlier testimony. It was appended to his earlier report. It's</p> <p>16 not the current one, so let's take that down, please.</p> <p>17 BY MR. QUINN:</p> <p>18 Q. In terms of the work that's been done to date, are you aware</p> <p>19 that there are a number of per capita and judgment account</p> <p>01:50:45 20 accounting statements complete and awaiting distribution?</p> <p>21 A. No, I'm not aware of the current situation at all.</p> <p>22 Q. Do you have any understanding of the accounts, to the extent</p> <p>23 that they've been reconciled, per capita and judgment accounts?</p> <p>24 A. No.</p> <p>01:51:04 25 Q. Do you have an understanding with respect to the</p>

<p>1594</p> <p>1 reconciliation on the land-based accounts, the high dollar value</p> <p>2 accounts; that is, \$100,000 account transactions and above?</p> <p>3 A. Currently?</p> <p>4 Q. Yes.</p> <p>01:51:25 5 A. No.</p> <p>6 Q. Let's go to a couple of the documents that Mr. Dorris showed</p> <p>7 you that were referenced in your report.</p> <p>8 MR. QUINN: Could we bring up AR-445, please? For the</p> <p>9 record, this is Bates number 22-3-1. It starts on that Bates</p> <p>01:52:03 10 number and runs three pages over to 22-3-3.</p> <p>11 BY MR. QUINN:</p> <p>12 Q. And I'll put this up on the screen.</p> <p>13 MR. QUINN: If we could zoom in a little bit on the</p> <p>14 introductory part.</p> <p>01:52:19 15 BY MR. QUINN:</p> <p>16 Q. Can you see that, Mr. Homan? Can you see that on your</p> <p>17 screen okay?</p> <p>18 A. Yes.</p> <p>19 Q. Do you recognize this as the document that you were</p> <p>01:52:26 20 describing and conversing with Mr. Dorris about a few minutes</p> <p>21 ago?</p> <p>22 A. Generally, yes. Although I can't see all of the document on</p> <p>23 my screen.</p> <p>24 Q. Well, we'll go down. I think the part you were referring to</p> <p>01:52:40 25 was at the bottom of page two and three. So if we go down to</p>	<p>1596</p> <p>1 believes that the department was not abiding by advice given by</p> <p>2 the Bank of America in terms of what it would do in a trust</p> <p>3 situation. And I'd like to have the witness answer one question</p> <p>4 about a statement just above this quotation, if I may.</p> <p>01:54:00 5 THE COURT: The only way I'm going to un-fact that is</p> <p>6 to hear the question. So let's hear what the question is.</p> <p>7 MR. QUINN: All right, Your Honor.</p> <p>8 Could you scroll up the page? Let's see. We should be</p> <p>9 on page two of the document. Scroll up a little bit more.</p> <p>01:54:18 10 Yeah, that introductory bit. Okay.</p> <p>11 BY MR. QUINN:</p> <p>12 Q. In fact, Mr. Homan, I want to ask you about the last</p> <p>13 sentence of the message to which the quoted material is</p> <p>14 appended. Where it says, "If there are gaps in the</p> <p>01:54:35 15 documentation, I would agree with the method the OHTA presented</p> <p>16 in their plan." Do you see that?</p> <p>17 A. Yes, I do see that.</p> <p>18 Q. And so in effect, Bank of America's representative was</p> <p>19 agreeing with what OHTA was putting into its plan. Correct?</p> <p>01:54:55 20 A. I can't represent that. That's not what it says.</p> <p>21 Q. Okay. You disagree with what that sentence says?</p> <p>22 A. I disagree, because what they quoted from the Bank of</p> <p>23 America is not done. It has to do with their beginning</p> <p>24 sentence, which says, "You have to validate the account."</p> <p>01:55:15 25 I saw nothing -- if we're going to talk about that Bank</p>
<p>1595</p> <p>1 the bottom of page two, we'll come back to the context here in a</p> <p>2 moment.</p> <p>3 Do you see that quoted section in the last paragraph,</p> <p>4 Mr. Homan?</p> <p>01:52:54 5 A. Yes.</p> <p>6 Q. Is that the part that you were testifying about a few</p> <p>7 minutes ago?</p> <p>8 A. Yes.</p> <p>9 Q. About what Bank of America would do?</p> <p>01:53:02 10 A. That's correct. That's where I got the quote.</p> <p>11 Q. Okay. That's where the quote came from. All right.</p> <p>12 Let's see if we can --</p> <p>13 MR. DORRIS: Your Honor, I'm going to object. I think</p> <p>14 this was where we were where you were indicating that it was</p> <p>01:53:16 15 remedies and we needed to move along.</p> <p>16 THE COURT: Right.</p> <p>17 MR. QUINN: Your Honor, I'd just like to put this --</p> <p>18 THE COURT: I sustained the objection that you didn't</p> <p>19 make.</p> <p>01:53:25 20 MR. QUINN: That's because in terms of the context,</p> <p>21 Your Honor, there's one question I'd like to ask this witness</p> <p>22 about in terms of the overall document, just to put it in</p> <p>23 context. It doesn't address the remedy issue, it addresses the</p> <p>24 advice.</p> <p>01:53:37 25 He opines in his expert report, and confirmed today, he</p>	<p>1597</p> <p>1 of America memorandum, then I saw nothing in that Bank of</p> <p>2 America -- or the plan that came even close to the first</p> <p>3 sentence there in the Bank of America's suggestion, which was</p> <p>4 that you have to validate the balance in the account. The only</p> <p>01:55:36 5 way you can validate the balances in the account is the way I</p> <p>6 suggested in previous testimony.</p> <p>7 Q. Do you agree with Bank of America that you would also ask</p> <p>8 the beneficiary to come forward with documentation?</p> <p>9 A. I'm not sure that's what they said.</p> <p>01:55:51 10 Q. Okay. Let's see if we can refresh your recollection.</p> <p>11 A. They have no documentation because none has ever been</p> <p>12 provided them.</p> <p>13 THE COURT: All right. Let's move on.</p> <p>14 MR. QUINN: It's in the record, Your Honor. Thank you.</p> <p>01:56:02 15 BY MR. QUINN:</p> <p>16 Q. With respect to another document Mr. Dorris asked you</p> <p>17 about --</p> <p>18 MR. QUINN: Can you put up AR-56?</p> <p>19 BY MR. QUINN:</p> <p>01:56:18 20 Q. Okay. Do you recognize this front page, Mr. Homan, as</p> <p>21 something you've seen before?</p> <p>22 A. Yes.</p> <p>23 Q. Let's go inside that document to at least the PDF pages 322.</p> <p>24 The Bates range I think you testified about concerns a document</p> <p>01:56:35 25 that begins at 42 -- 322, and then runs on a few pages from</p>

<p>1598</p> <p>1 there.</p> <p>2 I have the cover page up on the screen, Mr. Homan, from</p> <p>3 page 322. Do you recognize that as the document you testified</p> <p>4 about?</p> <p>01:56:50 5 A. Generally, yes.</p> <p>6 Q. With respect to the sentence you quoted in your opinion</p> <p>7 report at page 13 of the document, Bates 335?</p> <p>8 MR. QUINN: Can we move to that page? And can we zoom</p> <p>9 in on that first heading, first full paragraph? Thank you.</p> <p>01:57:30 10 BY MR. QUINN:</p> <p>11 Q. Do you see that all right, Mr. Homan?</p> <p>12 A. If you're -- which sentence are you referring to?</p> <p>13 Q. Under the title, it says, "What is the proper temporal scope</p> <p>14 for the reconciliation?"</p> <p>01:57:42 15 A. Yes.</p> <p>16 Q. You see that? And that's the excerpt you were quoting from,</p> <p>17 right, in your expert opinion?</p> <p>18 A. I think I quoted the first sentence, maybe the second.</p> <p>19 Q. And in terms of this Deloitte statement here, you recognize,</p> <p>01:57:56 20 do you not, that the statement here is concerning the legal and</p> <p>21 legislative standpoint in terms of where to start the historical</p> <p>22 accounting. That's what it says. Right?</p> <p>23 A. Yes. But -- yes.</p> <p>24 Q. So this is not a statement from an accounting perspective.</p> <p>01:58:12 25 Correct?</p>	<p>1600</p> <p>1 that document, Bates number six.</p> <p>2 MR. QUINN: Can we zoom in on the middle paragraph,</p> <p>3 please?</p> <p>4 BY MR. QUINN:</p> <p>02:01:02 5 Q. And Mr. Homan, there are other ways, correct, besides</p> <p>6 looking at a document over the passage of time that you can</p> <p>7 determine that a transaction occurred. Correct?</p> <p>8 A. Generally, yes, you can, if the records are available.</p> <p>9 Q. Okay. And, in fact, the Bank of America document that we</p> <p>02:01:24 10 were talking about goes back and talks about -- doesn't even</p> <p>11 talk about the original balance, does it?</p> <p>12 A. Are we allowed to talk about the Bank of America's</p> <p>13 methodology? I'd be glad to.</p> <p>14 Q. They don't go back to the original balance, though, in that?</p> <p>02:01:41 15 A. As I recall, they go back as far as they can reasonably, and</p> <p>16 then they settle for the difference. That's the remedy. It's a</p> <p>17 practical remedy used, as I said earlier, by the FDIC and in</p> <p>18 bank mergers.</p> <p>19 Q. And there are situations also where accountants would use</p> <p>02:02:01 20 alternative procedures. Right?</p> <p>21 A. That is one that's consistent with GAAP. That's the only</p> <p>22 one available -- or that I recognize is consistent with GAAP,</p> <p>23 and it's not the Bank of America's sole policy, it's the policy</p> <p>24 of the federal government.</p> <p>02:02:16 25 Q. Well, you mentioned GAAP. That brings to mind another</p>
<p>1599</p> <p>1 A. That would include the legal part, I would assume. And also</p> <p>2 the legislative account, which is required by the Reform Act.</p> <p>3 Q. I understand that's your interpretation. The document here,</p> <p>4 though, is not -- you agree it's referring to the legislative</p> <p>01:58:34 5 and historical legal issues in the case. Correct?</p> <p>6 A. They cover the gamut, as far as I'm concerned.</p> <p>7 Q. All right. Mr. Homan, I'd like to ask you about a couple of</p> <p>8 the documents that you looked at and considered and quoted</p> <p>9 toward the end of your report from Hughes & Bentzen.</p> <p>01:59:32 10 Take, for example, I think it's 516 -- or I'm sorry,</p> <p>11 616.</p> <p>12 MR. QUINN: Now, can you zoom in on that so the</p> <p>13 witness -- this is indexed administrative record 616, Bates</p> <p>14 range begins at 64-6-1.</p> <p>02:00:07 15 BY MR. QUINN:</p> <p>16 Q. Do you recognize that, Mr. Homan? It's one of the memoranda</p> <p>17 that you reviewed.</p> <p>18 A. Yes. Yes, I do.</p> <p>19 Q. And I think you quoted from that. Correct?</p> <p>02:00:16 20 A. I may have. I really -- I don't have it in front of me.</p> <p>21 I've quoted from several of those documents.</p> <p>22 Q. Do you recognize this one as addressing the issue concerning</p> <p>23 documentation that a trustee comes forward with?</p> <p>24 A. Yes.</p> <p>02:00:36 25 Q. And I would like to direct your attention to page five of</p>	<p>1601</p> <p>1 question I wanted to ask you in terms of GAAP.</p> <p>2 GAAP, even if all the documents -- you take the</p> <p>3 hypothetical all the documents existed, you had documentation to</p> <p>4 verify everything, all the data systems were there, there was</p> <p>02:02:35 5 never a report of any lack of controls on the systems, in terms</p> <p>6 of the way the system is structured, though, you could still not</p> <p>7 get a GAAP opinion. Right?</p> <p>8 A. The GAAP -- in that circumstance, you wouldn't get a GAAP</p> <p>9 opinion. But if -- the current auditors depend on prior audits</p> <p>02:03:00 10 as one of their criteria, and there's never been a GAAP audit of</p> <p>11 the Bureau of Indian Affairs, as Arthur Andersen said in 1998.</p> <p>12 Q. My question's a little different.</p> <p>13 A. It's a distinction without a difference for me. Could you</p> <p>14 rephrase it and I'll try to address it?</p> <p>02:03:15 15 Q. Perhaps that's because you're not an accountant, you don't</p> <p>16 recognize this.</p> <p>17 But if you have a cash basis system for accounting, you</p> <p>18 could not have a GAAP opinion. Isn't that correct?</p> <p>19 A. GAAP and/or RAP, you know, do allow for a cash basis, in</p> <p>02:03:33 20 accordance with generally accepted accounting principles. You</p> <p>21 can accrue or not accrue. Certain small businesses have that</p> <p>22 option under the tax code and under the accounting regulations.</p> <p>23 Or guidance, I should say.</p> <p>24 MR. QUINN: I'm trying to take your instructions to</p> <p>02:04:02 25 heart, Your Honor. May I have one moment?</p>

<div>1602</div> <div> <p>1 THE COURT: Well done, Mr. Quinn.</p> <p>2 (OFF THE RECORD.)</p> <p>3 MR. QUINN: Well, Your Honor, no more questions for</p> <p>4 this witness.</p> <p>02:04:34 5 THE COURT: Very well done, Mr. Quinn.</p> <p>6 MR. DORRIS: We have nothing further, Your Honor.</p> <p>7 THE COURT: Mr. Homan, thank you very much, sir.</p> <p>8 You're excused.</p> <p>9 THE WITNESS: Thank you, Your Honor.</p> <p>02:04:59 10 MR. GUILDER: Good morning, Your Honor. My name is</p> <p>11 Justin Guilder. For the record, this is the first time I'm</p> <p>12 appearing before you, but at a pretrial conference you've</p> <p>13 already admitted me pro hac vice, so I guess I don't need the</p> <p>14 appointment of the water.</p> <p>02:05:23 15 My witness will be Mr. Rick Fasold.</p> <p>16 THE COURT: All right.</p> <p>17 (Oath administered by Courtroom Deputy.)</p> <p>18 MR. KIRSCHMAN: Your Honor, before the testimony</p> <p>19 starts, I would just like to note for the record that I received</p> <p>02:05:55 20 a phone call last night informing us that Mr. McCarthy would be</p> <p>21 the next witness.</p> <p>22 So we are again at counsel table -- you might excuse us</p> <p>23 as we reshuffle a little.</p> <p>24 THE COURT: What's up with this?</p> <p>02:06:12 25 MR. GUILDER: I'm sorry, Your Honor, I wasn't aware of</p> </div>	<div>1604</div> <div> <p>1 some of the documents that defendants have put forward as their</p> <p>2 throughput analysis.</p> <p>3 THE COURT: Okay.</p> <p>4 MR. GUILDER: If we could first look at document number</p> <p>02:07:17 5 PPX-4208, please. And if we could go to page three, please.</p> <p>6 I'm sorry, the fourth page of the document.</p> <p>7 BY MR. GUILDER:</p> <p>8 Q. And Mr. Fasold, is that your resumé?</p> <p>9 A. Yes, it is.</p> <p>02:07:39 10 MR. GUILDER: And if you want to scroll down through</p> <p>11 that slowly, and it continues on the next page.</p> <p>12 BY MR. GUILDER:</p> <p>13 Q. While we look at that, could you briefly describe the scope</p> <p>14 of your experience with financial modeling?</p> <p>02:07:50 15 A. Yes. It began when I was --</p> <p>16 MR. WARSHAWSKY: Excuse me, Your Honor. I would like</p> <p>17 to note two objections. First of all, the Court has indicated</p> <p>18 to the extent you want an expert offered, that we would do it</p> <p>19 through review of a CV, and, if necessary, a voir dire. It's</p> <p>02:08:06 20 not necessary to have Mr. Fasold to go through his background.</p> <p>21 But more importantly, Mr. Fasold's testimony is going</p> <p>22 to be entirely cumulative of evidence that's already been</p> <p>23 received in this case. The plaintiffs have designated his</p> <p>24 entire transcript from the 2003 hearing for inclusion in the</p> <p>02:08:23 25 record here, and Mr. Fasold's expert report in the 2007 matter</p> </div>
<div>1603</div> <div> <p>1 that. I thought it was Mr. Fasold and then Mr. McCarthy. If I</p> <p>2 could have a moment, please?</p> <p>3 THE COURT: Is this a problem?</p> <p>4 MR. KIRSCHMAN: It's not a problem, but we will be</p> <p>02:06:21 5 reshuffling our laptops and the like.</p> <p>6 THE COURT: Shuffle away.</p> <p>7 Go ahead, Mr. Guilder.</p> <p>8 MR. GUILDER: Thank you, Your Honor.</p> <p>9 THE COURT: Has the witness been sworn? That escaped</p> <p>02:06:32 10 me.</p> <p>11 (RICHARD FASOLD, PLAINTIFF witness, having been duly sworn,</p> <p>12 testified as follows:)</p> <p>13 DIRECT EXAMINATION</p> <p>14 BY MR. GUILDER:</p> <p>02:06:33 15 Q. Mr. Fasold, could you please state your full name for the</p> <p>16 record?</p> <p>17 A. Yes. My name is Richard E. Fasold, and that's spelled</p> <p>18 F-A-S-O-L-D.</p> <p>19 MR. GUILDER: Your Honor, if you would like, I can</p> <p>02:06:44 20 briefly summarize an outline format as you mentioned before?</p> <p>21 THE COURT: That would be useful.</p> <p>22 MR. GUILDER: I'll briefly go through Mr. Fasold's</p> <p>23 background as a financial modeler and as it relates to this</p> <p>24 case, and then we'll go through his expert opinion and financial</p> <p>02:07:01 25 model, and then finally we will conclude with an analysis of</p> </div>	<div>1605</div> <div> <p>1 simply incorporates by reference his 2003 report. He says he</p> <p>2 has done no additional work since 2003; at the direction of</p> <p>3 plaintiffs, nothing's been done since 2003.</p> <p>4 So this is going to be entirely cumulative of what</p> <p>02:08:41 5 happened in 2003. It's a waste of the Court's resources.</p> <p>6 THE COURT: Well, I'm not sure I agree with that,</p> <p>7 Counsel. On the subject of qualifications, you can skip right</p> <p>8 to the bottom line on that.</p> <p>9 As far as what his opinions are, I'd like to hear them.</p> <p>02:09:00 10 I mean, I haven't read his 2003 testimony, so it's not</p> <p>11 cumulative to me. It's all new to me. Let's go.</p> <p>12 MR. GUILDER: Okay.</p> <p>13 If there's no objection, then I would like to right now</p> <p>14 move for Mr. Fasold's admission as an expert in financial</p> <p>02:09:21 15 modeling, if that's what defendants have indicated.</p> <p>16 MR. WARSHAWSKY: No objection, Your Honor.</p> <p>17 THE COURT: All right.</p> <p>18 MR. GUILDER: Okay. Thank you.</p> <p>19 BY MR. GUILDER:</p> <p>02:09:30 20 Q. Well, I guess we'll jump ahead from where we thought we were</p> <p>21 going to be.</p> <p>22 MR. GUILDER: Could we put up on the screen the first</p> <p>23 page of 4208, please?</p> <p>24 BY MR. GUILDER:</p> <p>02:09:42 25 Q. And just for the record, do you recognize this document?</p> </div>

<p>1606</p> <p>1 A. Yes. That is my expert report of August 2007.</p> <p>2 Q. Okay. And this incorporates your prior expert report. Is</p> <p>3 that correct?</p> <p>4 A. Yes, it does.</p> <p>02:09:56 5 Q. And plaintiffs came to you and asked you to do -- perform a</p> <p>6 task that ultimately resulted in this report. Could you explain</p> <p>7 what that task was?</p> <p>8 A. Yes. They asked me in the spring of 2000 to calculate the</p> <p>9 revenues generated on the Individual Indian Monies Trust from</p> <p>02:10:25 10 1887 through the current time, where I would rely upon documents</p> <p>11 other than generated by the Department of Interior, to the</p> <p>12 extent possible.</p> <p>13 And that was the mission given to me.</p> <p>14 Q. And it was just mentioned that you did not update this,</p> <p>02:10:47 15 according to your expert report. If you could briefly explain</p> <p>16 what that meant -- what you meant by saying you did not update</p> <p>17 this.</p> <p>18 A. Yes. My report encompasses data from 1887 to 2002. And</p> <p>19 presumably data is available for the years 2003 through 2006,</p> <p>02:11:08 20 and we did not garner the source data to perform the analysis to</p> <p>21 update the report from 2002 to I would presume 2006 would be</p> <p>22 appropriate.</p> <p>23 Q. So in part --</p> <p>24 THE COURT: Did anybody tell you why they were asking</p> <p>02:11:25 25 you to rely on documents other than those generated by the</p>	<p>1608</p> <p>1 accounts; it was just the money that was generated from the</p> <p>2 Trust assets.</p> <p>3 Q. So in a sense, this was an attempt to demonstrate inputs?</p> <p>4 A. Right. Yeah, we attempted in all cases to get hopefully the</p> <p>02:13:23 5 universe of reliable data, and then subdivide that universe into</p> <p>6 the income that resulted in trust to allottees.</p> <p>7 Q. And if we could start analyzing your methodology by starting</p> <p>8 with the GIS image overlays process. Could you briefly describe</p> <p>9 what GIS is?</p> <p>02:13:49 10 THE COURT: Just before you get into the GIS, let me</p> <p>11 make sure that I've got the bounds of this inquiry. You're</p> <p>12 trying to find out how much money hit the door, and not how much</p> <p>13 money should have hit the door?</p> <p>14 THE WITNESS: No. We wanted -- the actual dollars that</p> <p>02:14:05 15 were received by the Department of Interior on behalf of the</p> <p>16 beneficiaries was the way we viewed our objective.</p> <p>17 THE COURT: Okay. And you were interested in receipts,</p> <p>18 not necessarily what was posted or accounted for?</p> <p>19 THE WITNESS: No, we didn't have that kind of</p> <p>02:14:22 20 information available, nor did we draw any conclusions to that.</p> <p>21 THE COURT: Okay. Thank you.</p> <p>22 BY MR. GUILDER:</p> <p>23 Q. If you could briefly explain the use of GIS software in your</p> <p>24 methodology.</p> <p>02:14:36 25 A. GIS software -- I mean, all these acronyms always sound</p>
<p>1607</p> <p>1 Department of the Interior, to the extent possible?</p> <p>2 THE WITNESS: Yes, Your Honor. They directed me to the</p> <p>3 extent possible to do that because, and they explained it --</p> <p>4 counsel explained it to me, due to the unreliability of the data</p> <p>02:11:44 5 that they had from the Department of Interior.</p> <p>6 THE COURT: Okay.</p> <p>7 BY MR. GUILDER:</p> <p>8 Q. Did you rely solely on plaintiffs' representation that it</p> <p>9 was unreliable data?</p> <p>02:11:57 10 A. No, we also conducted our own due diligence of what we</p> <p>11 thought would happen amongst the public record at the time, and</p> <p>12 that's when we encountered unavailable - a large number, as I</p> <p>13 recall - of the GAO reports that occurred over a period of time</p> <p>14 where they had looked at the BIA, and specific, the IIM</p> <p>02:12:23 15 accounts.</p> <p>16 Q. Could you move the microphone a little closer?</p> <p>17 A. Okay. Or I'll move closer to it.</p> <p>18 Q. Okay. And so you were tasked with finding essentially</p> <p>19 impartial data. Is that what you were saying?</p> <p>02:12:38 20 A. Yeah. We were -- what we arrived at is we were trying to</p> <p>21 determine then what data in theory, what income hit the door, if</p> <p>22 you want to put it that way, of the Department of Interior. In</p> <p>23 other words, what monies did they receive. From like my banking</p> <p>24 experience, that would be captured in the first instance, and</p> <p>02:13:05 25 not necessarily measuring what were applied to specific</p>	<p>1609</p> <p>1 perhaps a little daunting, but it really is once again a</p> <p>2 computer application of something you could accomplish yourself,</p> <p>3 given enough time.</p> <p>4 And GIS software, generally speaking, is the use of a</p> <p>02:14:53 5 map that has been digitized, and digitized meaning it is able to</p> <p>6 be brought up in electronic form. And then, as the GIS people</p> <p>7 call it, they superimpose, and if you look at what you would</p> <p>8 think of perhaps like a clear plastic overlay of this map. And</p> <p>9 GIS people are prone to call the boundaries of the area that</p> <p>02:15:21 10 they're trying to identify as polygons. And those are</p> <p>11 irregularly shaped objects. So in this case, a polygon might be</p> <p>12 an Indian reservation.</p> <p>13 And then there are sources of data that have also been</p> <p>14 reduced to electronic data --</p> <p>02:15:43 15 Q. Excuse me for a second, Mr. Fasold. Did you perform this</p> <p>16 GIS overlay or did you contract with somebody?</p> <p>17 A. No, we contracted with Farragut Systems, which is a GIS firm</p> <p>18 that specializes only in GIS applications.</p> <p>19 Q. And so they're very experienced in this field?</p> <p>02:16:04 20 THE COURT: GIS has to be an acronym for something.</p> <p>21 THE WITNESS: Geographical Information Systems, Your</p> <p>22 Honor.</p> <p>23 MR. GUILDER: I thought it might have been on the</p> <p>24 glossary.</p> <p>02:16:14 25 BY MR. GUILDER:</p>

<p>1610</p> <p>02:16:30 1 Q. So you used Farragut Systems to create this GIS map, 2 essentially? 3 A. Yes. In essence, they manipulate the data. The physical 4 map comes with a software program that enables these overlays of 5 data, and ARC review system is the basic system that they 6 started with. 7 Q. So you spoke a moment ago about polygons. By those 8 polygons, are you referring to the reservation boundaries? 9 A. Yes. In this particular application, it is their 10 terminology, polygon, which is the irregularly bounded borders 11 of, again, Indian reservations. 12 Q. Okay. And before we move on to that identification of those 13 lands, are you aware of any other users of GIS and the reliance 14 they place on this software? 15 A. Yes. I mean, and I use this example: My home in Colorado 16 has a GIS application, actually. We are in the boundary of a 17 national forest. And a few years ago, the forest, there was a 18 huge fire called the Hayman Fire, 130,000 acres that we could 19 observe from our house. 20 When that fire started and started blowing up to us, I 21 at the time had about four telephone lines. They all rang. You 22 picked them up, there was a recorded message saying "prepare for 23 evacuation." 24 That was the use of a GIS system. And what they did is 25 called reverse 911 - and they're able to do that in many areas</p>	<p>1612</p> <p>1 can interact with online, and it has various overlays, including 2 the location of gas and oil wells. 3 Q. You said that BLM has a GIS software that has graphic 4 overlays of oil and gas? 5 A. Yes. If you pull up that site, it comes up with a basic map 6 with state boundaries, for example. You can overlay roads, you 7 can overlay rivers. Another option that you can click overlays 8 gas and oil wells. 9 Q. Okay. And so let's move on to how you identified these 10 polygons you were talking about earlier that are the reservation 11 boundaries. Did that come with the GIS software you got from 12 Farragut Systems, or did you do that research? 13 A. No, the boundaries, the polygons that we received digitized 14 was available at the Department of Interior website when we 15 first started this case, at least for a long period after we 16 started the case, it was brought down. I don't believe it's 17 publicly accessible anymore. 18 Q. And so did you rely solely on that information from Interior 19 Department to create these polygons? 20 A. No, no. We purchased a number of maps that we also had 21 digitized. And that means we sent it out to people who 22 literally take a map and mark the boundaries of the reservation; 23 in essence, connect the dots between where they mark. Extremely 24 tedious kind of work. 25 Q. So after you put these polygons from collecting from the</p>
<p>1611</p> <p>02:18:10 1 of the country - and that is the fire department drew a line, a 2 polygon, and said, everybody that has a phone number that 3 terminates in this area, call them and give them the 4 notification for evacuation. 5 And that's an excellent example of how they're used in 6 real life, and that is, you know, they could draw any boundary 7 and instantly the computer could overlay that and make calls 8 out. So that's one of the examples in practical life. 9 The other one that we're aware of is utility companies. 10 If they start getting calls from different customers, they can 11 identify where that call is coming from, and that superimposes 12 on to their utility branching network. And they frequently can 13 identify where the break occurred because these following people 14 were affected. So it's in more and more common use for a number 15 of applications. 16 Another one comes to mind is when they build a highway, 17 they use GIS to estimate how much earth has to be moved, and 18 they decide where it can be moved and disposed of by volume. 19 They know exactly what the volume of earth is to be moved. 20 Before they just had to start digging and order up enough dump 21 trucks to haul it away. 22 Q. Have you seen any use of this GIS software by the Department 23 of Interior in your experience? 24 A. Yeah. As a matter of fact, it's available online today, and 25 that is the -- the BLM has a GIS software application that you</p>	<p>1613</p> <p>1 maps that you purchased, the next step was to place -- as the 2 terminology is, point intersects on top of that of other 3 information. 4 And if we could talk about the oil and gas information 5 you overlaid on top of that. Who did you contract to provide 6 the oil and gas information? 7 A. Ultimately we selected a petroleum engineering firm that was 8 then called Questa, Q-U-E-S-T-A. 9 Q. And was it Questa's own information that you used, or was it 10 other information? 11 A. No, we had already identified and purchased a software 12 package that through the years the old timers call it 13 PI/Dwight's. It has since been acquired by a firm called IHS, 14 so it's now referred to as the IHS software. And they provide, 15 for a fee, of course, in essence the latitude and the longitude 16 of every oil and gas well drilled in the United States, and they 17 provide certain associated data with each individual well. 18 Q. And is there another company that also provides that type of 19 information? 20 A. Yes. A company now is in competition with them, and that is 21 called PDS. And I believe it stands for Petroleum Data 22 Services. 23 Q. And do those companies, do they create this information or 24 do they rely on other parties to gather information about wells? 25 A. That data is generally garnered from local records, and that</p>

<p>1614</p> <p>1 would be county and/or state, where they captured in the first</p> <p>2 instance the location of the well. And they measured, which we</p> <p>3 were most interested in, the production of a particular well,</p> <p>4 they'd measure that typically by calculating how much tax was</p> <p>02:23:17 5 paid on, for example, a barrel of oil.</p> <p>6 Q. So the information in IHS or PDS is tax information, in</p> <p>7 part?</p> <p>8 A. In part. In part it's derived from taxing -- the tax that</p> <p>9 was paid on a particular barrel of oil produced.</p> <p>02:23:34 10 Q. So the information in there is only information that tax has</p> <p>11 been paid on?</p> <p>12 A. That is one source of their information. They do outline</p> <p>13 some other sources when they don't have tax information. So I</p> <p>14 wouldn't say 100 percent of either IHS or PDS is 100 percent</p> <p>02:24:00 15 related to tax sources.</p> <p>16 Q. What type of industry reliance is placed on these companies'</p> <p>17 information, IHS and PDS's information?</p> <p>18 A. Yeah, the one that's used, one of the more -- the highest</p> <p>19 reliance placed on it is to calculate underground reserves,</p> <p>02:24:22 20 underground reserves. And they use that data in the first</p> <p>21 instance, and that, of course, post Sarbanes-Oxley becomes very</p> <p>22 important in public statements of oil and gas firms.</p> <p>23 So they use the PI/Dwight's, give it to their petroleum</p> <p>24 engineers who calculate reserves, for example.</p> <p>02:24:42 25 They also, this data is used by prospectors to try to</p>	<p>1616</p> <p>1 A. We had, yeah, in theory, totally unbiased, universal data,</p> <p>2 and they were given from Farragut Systems the subset of those</p> <p>3 who were contained within the boundaries of an Indian</p> <p>4 reservation.</p> <p>02:26:27 5 Q. And did Questa Engineering do anything else to further</p> <p>6 inform how much revenue is produced on those wells that are then</p> <p>7 contained within the polygon?</p> <p>8 A. Right. Once they had the identified wells, the IHS data and</p> <p>9 PDS data as a general statement show the well production,</p> <p>02:26:50 10 meaning the units, being barrels of oil or thousands of cubic</p> <p>11 feet of gas, that have come out on a monthly basis, or as you</p> <p>12 can add them up, for a yearly basis.</p> <p>13 That data in general from IHS only has cumulative data</p> <p>14 prior to about the early 1970's; '70, '71, '72 is where they</p> <p>02:27:20 15 start providing monthly data. PDS's entree into the market has</p> <p>16 been they're going to provide monthly data preceding the 1970</p> <p>17 time frame.</p> <p>18 But what the petroleum engineers do is they know</p> <p>19 exactly how much that well has produced, for example, from date</p> <p>02:27:41 20 of drilling through 1970; what they need to do is then spread</p> <p>21 that over that time frame from a lump sum number.</p> <p>22 And what they use is a technique that is unique or a</p> <p>23 specialty of petroleum engineers, is the decline curves. And</p> <p>24 they can fit, retrofit that cumulative data into years from</p> <p>02:28:06 25 inception through when the data is available monthly.</p>
<p>1615</p> <p>1 calculate. There's core data involved with that, so the</p> <p>2 prospector can see what wells may have been drilled in the area</p> <p>3 and draw some geological conclusion from that.</p> <p>4 Q. So companies are relying on this data, and surveyors. How</p> <p>02:25:03 5 about taxing authorities?</p> <p>6 A. The taxing authorities to my knowledge don't rely on that.</p> <p>7 They rely in general -- my understanding is they rely on meters</p> <p>8 that -- meters that measure the flow of oil coming out of a</p> <p>9 particular well.</p> <p>02:25:19 10 Q. But then what's reported back to those companies is the tax</p> <p>11 information, in part, to IHS and PDS --</p> <p>12 A. Well, yeah.</p> <p>13 Q. -- from the companies?</p> <p>14 A. Actually, IHS and PDS literally have to go down to the local</p> <p>02:25:34 15 source of information and pull that back. I don't believe any</p> <p>16 state or county agencies voluntarily dispense that information</p> <p>17 to them.</p> <p>18 Q. And what did Questa do with that information?</p> <p>19 A. Well, what we got was the equivalent of another clear</p> <p>02:25:51 20 plastic overlay with dots or intersections of every well in the</p> <p>21 western United States. And what the GIS people did is</p> <p>22 identified for Questa those wells that were located within the</p> <p>23 boundaries of an Indian reservation.</p> <p>24 Q. So essentially, it identified a subset of the original</p> <p>02:26:12 25 information?</p>	<p>1617</p> <p>1 So they plot this down and enable us to find which year</p> <p>2 these barrels of oil were produced.</p> <p>3 Q. So the information, let's say pre-'72, let's call it that</p> <p>4 year, is cumulative information that is then plotted to some</p> <p>02:28:27 5 type of curve --</p> <p>6 A. Right.</p> <p>7 Q. -- decline curve?</p> <p>8 And so all the information's already there, it's just</p> <p>9 plotting it per year?</p> <p>02:28:34 10 A. Right. Yeah. The only error or the only interpretation is</p> <p>11 which years it had come in. And obviously, their known decline</p> <p>12 curves for each of these fields, they're very confident that</p> <p>13 they have put it into the appropriate years.</p> <p>14 Q. And then after you had that -- so you have a total revenue</p> <p>02:28:59 15 production in terms of barrels of oil or cubic feet of gas.</p> <p>16 What happens next with those calculations?</p> <p>17 A. Yeah, then, again, this is a Questa determined number. They</p> <p>18 look through their historical data and publicly available data,</p> <p>19 their own internal records, and they determine the price of oil</p> <p>02:29:26 20 that was paid in each of those given periods.</p> <p>21 And that is determined by research. It is also -- the</p> <p>22 West Texas crude is sort of the standard in terms of quality.</p> <p>23 And they also apply factors for specific gravity and sulfur</p> <p>24 content, which are two of the major variables that would render</p> <p>02:29:46 25 a barrel of oil at a price less than West Texas crude.</p>

<p>1618</p> <p>02:30:11 1 Q. So Questa provides all the information back to you in terms 2 of the price and the revenue of each well's oil? 3 A. Yeah. They provide the units, the dollars, and the next 4 thing they provide is the royalty percentage that would be 5 applicable for that time frame. 6 Q. Okay. And there's going to be one more step before you 7 determine what is allocable to individual Indians, but we'll 8 come back to that. I want to move through the all revenue 9 sources that you used. 02:30:26 10 And the next revenue source is hard rock minerals. And 11 you used a different company to provide this information. Could 12 you say what that company's name is? 13 A. Yes. The hard rock experts were Pincock Allen & Holt. 14 Q. And this is something that they exclusively perform, is 02:30:47 15 specialize in hard rock minerals? 16 A. Yes, they are hard rock mineral engineers that provide 17 various services to commercial interests. 18 Q. What type of minerals have been exploited from allotted 19 land? 02:31:01 20 A. There's quite a few. I think probably the largest would be 21 coal that goes down to phosphates were also a major source of 22 revenues. You have the precious metals, gold, silver, platinum. 23 In a certain period of time they had lead and zinc, and also 24 there was a significant amount of uranium mined off of Indian 02:31:35 25 lands.</p>	<p>1620</p> <p>1 A. No. The MAC/MILS database is you might say overly detailed. 2 It includes just about any mine, whether it was commercially 3 viable or not. 4 So Pincock Allen & Holt did their research, and from 02:33:32 5 their knowledge, very rapidly winnowed out the vast majority of 6 the mines as being never commercially viable. 7 Q. And of those that were commercially viable, they then 8 provided the information back to you of -- how did you break 9 that down? Was it a -- you know, it's not going to be the 02:33:53 10 gallons or the barrels, like oil. What type of information did 11 they provide to you? 12 A. Well, they appropriately identified the units, like coal, it 13 would be tons; precious metal, ounces. So each one of the 14 precious metal categories they would identify the unit, they 02:34:13 15 would identify again the cost and the typical royalty paid if 16 the land was leased by a commercial enterprise and exploited for 17 the mineral values. 18 Q. So they were able to provide all commercially exploited mine 19 information in terms of revenue? 02:34:31 20 A. That's correct. 21 Q. Okay. And then you next turned to a resource to find out 22 timber production? 23 A. Right. Timber production, we also had hoped that we would 24 have some kind of universal database and do a GIS overlay. And 02:34:49 25 after extensive research, we found no reliable commercial</p>
<p>1619</p> <p>02:31:52 1 Q. And Pincock Allen & Holt, are they experts in all of these 2 areas? 3 A. Yes. The engineers for natural resources sort of divide 4 themselves into the oil and gas, and then the firms that 5 specialize in hard rock, in essence, specialize in all the other 6 minerals that can be mined. 7 Q. Okay. And were they able to provide where those points of 8 mines fell on the GIS software, or did you go to another 9 database to find that information? 02:32:08 10 A. Right. There are a couple of databases that plot the 11 location - again, usually by latitude and longitude - of each of 12 the mines. And that -- the original -- there was a Bureau of 13 Mines database that contained that. They were merged back into 14 the Department of Interior, so they don't -- I think they went 02:32:33 15 into the USGS. 16 So they combined a database that is called MAC/MILS, 17 M-A-K/M-I-L-S -- M-A-C, I'm sorry, M-I-L-S. So we call it 18 MAC/MILS, and that database, again, a universe of database of 19 mines that were at one time mined in the United States. 02:32:57 20 Q. And how many of those mines fell within the polygons of the 21 boundaries that you put down on the maps? 22 A. As I recollect, there were about 2,000 identified sources of 23 mines. 24 Q. And are all of those mines valuable resources? Were oil 02:33:14 25 extracted from those mines?</p>	<p>1621</p> <p>1 database that talked about timber. 2 So we retained Professor Allen McQuillan, University of 3 Montana, and his background included working on a couple of 4 major cases in the field called Mitchell 1 and Mitchell 2, which 02:35:12 5 were legal cases directly addressed at timber recovery off of 6 Indian lands. 7 Q. So he already had a working knowledge of timber production 8 on Indian land? 9 A. Right. He had obviously extensive experience, being one of 02:35:29 10 the lead experts in the field. 11 Q. And that knowledge extended to individual Indian lands? 12 A. Yes. 13 Q. And what was he able to use to understand whether a piece of 14 wood came from individual land or Tribal land? 02:35:45 15 A. Yeah, the source data, whenever he could see it available, 16 was what is called a scale ticket. And, in essence, it derives 17 from when these trucks pull out of the harvested area and have a 18 number of logs on them. Those logs are identified as to the 19 owner of the land from which it came. 02:36:08 20 And so those scale tickets will identify whether that 21 was -- if it came from a reservation, whether it came off of an 22 individually owned or allocated land, whether it was a tribally 23 owned, whether it was non-Indian owned, whether it was BLM 24 owned, or any one of the other categories that could come off 02:36:30 25 harvested timber from an Indian reservation.</p>

<p>1622</p> <p>1 Q. And then now you know -- or Professor McQuillan knew whether</p> <p>2 a piece of wood and how much came from individual land. What</p> <p>3 did he do next with that data?</p> <p>4 A. Yeah, the data they call in that industry, the way to</p> <p>02:36:50 5 measure it, they call it V and V, volume and value. And so a</p> <p>6 scale ticket would tell the volume estimated in a particular</p> <p>7 tree, how many board feet, and then he would apply the</p> <p>8 commercially available rate for that specific kind of species of</p> <p>9 tree in that particular area, that particular year.</p> <p>02:37:13 10 Q. So each one of these experts has been an oil and gas, a</p> <p>11 minerals and a timber expert, and they provide information to</p> <p>12 you as to how much revenue was derived from those resources?</p> <p>13 A. That's correct.</p> <p>14 Q. And then after that, there are other areas that generated</p> <p>02:37:29 15 revenue for individual Indians, some of those that you</p> <p>16 researched yourself. Land leases, that was one area. Could you</p> <p>17 briefly describe the types of land leases?</p> <p>18 A. Well, we looked again for any kind of universal database,</p> <p>19 and were unable to find any universal database. We looked also</p> <p>02:37:48 20 then to see if there were any land lease experts that have</p> <p>21 testified before or have done the research before, and we found</p> <p>22 none.</p> <p>23 So then we went to -- again, trying to abide by our</p> <p>24 non-DOI sourcing, we purchased a number of books, 50 or 100</p> <p>02:38:09 25 books, periodicals, anything we could find, many times off of a</p>	<p>1624</p> <p>1 Q. The vast number, you mean, of leases?</p> <p>2 A. Of the data points.</p> <p>3 Q. For leases?</p> <p>4 A. Yeah, for leases.</p> <p>02:39:52 5 Q. Okay. And so you were describing the four types of leases</p> <p>6 that are broken up, I guess, by Interior. And it's agricultural</p> <p>7 and three other?</p> <p>8 A. Yeah, agriculture and grazing. And those were basically the</p> <p>9 two types of land leases that were categorized as such up until</p> <p>02:40:12 10 about 1996, when they added two other categories and started</p> <p>11 reporting on it, and that was business and then the old "other"</p> <p>12 category.</p> <p>13 Q. And did you recognize when you took these data points any</p> <p>14 type of patterns that developed?</p> <p>02:40:26 15 A. Yes. What we did is, in essence, plot these datas literally</p> <p>16 on a chart. And for example, with agriculture, you could</p> <p>17 quickly say, if you plotted them and connected the dots, you</p> <p>18 would form a very logical and predictable curve. They plotted</p> <p>19 out onto a geometric curve.</p> <p>02:40:50 20 That was true for agriculture, it was true for</p> <p>21 business, and it was true for the other category. It was fairly</p> <p>22 logical and reasonable to assume those were geometric curves.</p> <p>23 Q. And now briefly before we get down this, these data points,</p> <p>24 are these aggregate data points?</p> <p>02:41:13 25 A. Yes. There are a lot of data points by reservation, but in</p>
<p>1623</p> <p>1 website called aBOOKS, which has used bookstores from around the</p> <p>2 United States, and we were able to garner copies of valuable</p> <p>3 source data.</p> <p>4 We also purchased every annual report, the</p> <p>02:38:33 5 commissioner's annual report, which contained a lot of data.</p> <p>6 And what we learned from all of this is what we call</p> <p>7 data points, and that would be a particular year where there was</p> <p>8 a particular income, and they categorized land leases over the</p> <p>9 years into four different categories. One was agriculture,</p> <p>02:38:53 10 which was the earliest. I think it began around 1900.</p> <p>11 Q. You said there were agricultural leases in 1900 you found?</p> <p>12 A. Yeah, that's the first instance of data available.</p> <p>13 THE COURT: Who categorized land leases over the years</p> <p>14 into four different categories?</p> <p>02:39:08 15 THE WITNESS: Your Honor, really the sourcing of all of</p> <p>16 that, regardless of the contemporaneous books that we found</p> <p>17 those, quote, "data points" in, unquote, was the DOI. Most of</p> <p>18 them were contemporary, they had done their research with the</p> <p>19 DOI, and then published in their book, sometimes giving</p> <p>02:39:31 20 attribution and sometimes not.</p> <p>21 BY MR. GUILDER:</p> <p>22 Q. So essentially in that realm, although you attempted to find</p> <p>23 independent numbers, you did not?</p> <p>24 A. Yeah. I would suspect that the vast majority of our numbers</p> <p>02:39:42 25 were not truly independently calculated by a third party.</p>	<p>1625</p> <p>1 each year if I only got one or two reservations, that said</p> <p>2 nothing about the total.</p> <p>3 So we ultimately had to use, and used, the aggregate</p> <p>4 data of saying all Indian leases, allocated Indian leases in a</p> <p>02:41:32 5 given year.</p> <p>6 Q. And you didn't mention grazing leases as fitting onto that</p> <p>7 curvature you described. Was there not a pattern there?</p> <p>8 A. Yeah, if you plot the grazing data, what I have called -- if</p> <p>9 you were to plot it out on a chart, I called it a saw tooth</p> <p>02:41:51 10 because it was sort of irregular like a saw tooth blade. So you</p> <p>11 really couldn't say there is a trend here that I could identify.</p> <p>12 So we had more difficulty with grazing than normal. We</p> <p>13 did plot -- we had a large number of data that we could plot; we</p> <p>14 connected the dots, it produced a saw tooth. And to project</p> <p>02:42:13 15 that into a future value, we also used the paradigm developed by</p> <p>16 BLM sources. Commonly -- I think in 1934 there was an act</p> <p>17 passed called the Taylor Grazing Act which required the BLM to</p> <p>18 start reporting.</p> <p>19 Their reporting overlapped Indian reporting, and we saw</p> <p>02:42:42 20 that this saw tooth pattern matched, and so we were able to</p> <p>21 replicate that into the future.</p> <p>22 Q. And then after -- there was another category that you used</p> <p>23 called land sales. Could you briefly describe the information</p> <p>24 used to pattern land sales?</p> <p>02:42:58 25 A. Right. Land sales were very difficult to deal with, because</p>

<div>1626</div> <div> <p>1 as we know, over the period of time from 1887 until now,</p> <p>2 literally tens of thousands and millions of acres were alienated</p> <p>3 from the system.</p> <p>4 So that's certainly a large amount of land that left</p> <p>02:43:20 5 the system, and trying to determine what happened is difficult.</p> <p>6 But the big leg up for all the data from 1887 to I believe 1934</p> <p>7 was from the National Resources Board, which I believe was an</p> <p>8 FDR appointed board. And they provided a bunch of data, a lot</p> <p>9 of data, and a lot of it related to Indians and individual</p> <p>02:43:49 10 Indian land sales.</p> <p>11 So we started with that and determined of the existing</p> <p>12 pool of allocated lands still in trust, what percentage was sold</p> <p>13 in any given year. And over that period of time, that</p> <p>14 percentage was reasonably constant.</p> <p>02:44:07 15 Q. I'm sorry to interrupt. You said that there was land</p> <p>16 alienated. How many acres were alienated , in your experience</p> <p>17 researching this issue?</p> <p>18 A. Yeah, I'm not sure anybody has the exact number. But</p> <p>19 clearly in 1887, beginning in 1887, there were tens of millions</p> <p>02:44:32 20 of acres already in allocation status before the Dawes Act was</p> <p>21 passed in 1887. And the total, I have seen various estimates,</p> <p>22 but somewhere between 40 and 57 million acres were at one time</p> <p>23 individually Indian allocated.</p> <p>24 Q. And does your approach, does that assume that all those</p> <p>02:44:56 25 lands that are alienated sold?</p> </div>	<div>1628</div> <div> <p>1 A. Yeah, that was another challenge for us. And we identified</p> <p>2 databases that told us once again where every pipeline in the</p> <p>3 United States was, when it occurred, when it was laid, where the</p> <p>4 utility lines were in the United States, where roads were in the</p> <p>02:46:43 5 United States, when they were made.</p> <p>6 One of the interesting things is we did an overlay of</p> <p>7 railroads, and I had a preconception that was totally wrong, and</p> <p>8 that is I thought we would start measuring rail lines that were</p> <p>9 laid post 1887 and be able to measure the rights of ways</p> <p>02:47:06 10 procured then.</p> <p>11 And we found out just about all significant rail lines</p> <p>12 were already laid by 1887, which I found interesting, since we</p> <p>13 only did the transcontinental, railroad, what, in 1854.</p> <p>14 So those railway rights of way were all secured prior</p> <p>02:47:28 15 to 1887, But we did have this database, actually several</p> <p>16 databases, that gave us once the universal scope of rights of</p> <p>17 way.</p> <p>18 Our problem, which was extraordinarily disappointing to</p> <p>19 us, is we never found any experts that could tell us what the</p> <p>02:47:49 20 value of those rights of way that actually produced income for</p> <p>21 Indians. We interviewed several firms, and nobody was able to</p> <p>22 do it at any reasonable cost.</p> <p>23 Q. And were you concerned that you were unable to put that</p> <p>24 revenue source into your methodology? I mean, did it account</p> <p>02:48:07 25 for any money, in your opinion, with your research?</p> </div>
<div>1627</div> <div> <p>1 A. No. There were -- again, that is a story that is not</p> <p>2 heartening to look at. But a number of Indian lands were</p> <p>3 alienated, meaning taken out of the system without any</p> <p>4 documentation about why they left. So that's why we were left</p> <p>02:45:21 5 with saying, I'm only going to document those that we document</p> <p>6 were sold. And so that's where we started our data.</p> <p>7 Because there were a number of acres, and we've done</p> <p>8 some research and it isn't relevant particularly, but how did</p> <p>9 lands become alienated that were not revenue generators for</p> <p>02:45:44 10 individual Indians? And the answer is a lot, and that is</p> <p>11 another sad tale of the Indians.</p> <p>12 Q. So your data only relied on what you could identify as sold?</p> <p>13 A. Right.</p> <p>14 Q. Okay.</p> <p>02:45:52 15 A. As again, we were back to the source of revenues that we</p> <p>16 could logically expect that the Department of Interior received.</p> <p>17 Q. And there were some gaps in the data that you had for land</p> <p>18 leases and land sales. Is that correct?</p> <p>19 A. Yes. Clearly we didn't have data for each individual year</p> <p>02:46:08 20 over the time span covered.</p> <p>21 Q. And we'll get back to how you treated those gaps in a few</p> <p>22 moments.</p> <p>23 I just want to finish up with the other revenue sources</p> <p>24 that go into this model. Were you able to quantify rights of</p> <p>02:46:21 25 ways?</p> </div>	<div>1629</div> <div> <p>1 A. Yeah, it's -- I guess the old Navy term is oink-oink or</p> <p>2 unk-unk, which is U-N-K-U-N-K, unknown unknowns, I don't know</p> <p>3 what I don't know.</p> <p>4 So we didn't have reliable data to present to this</p> <p>02:48:33 5 Court about rights of way. However, the only thing I could</p> <p>6 comment on is anecdotal, and that is clearly it was well in</p> <p>7 excess of \$1 billion of revenues that were negotiated and</p> <p>8 deposited ultimately at the Department of Interior. I don't</p> <p>9 know what the number is in any reliable fashion.</p> <p>02:48:56 10 Q. And now, were there any other revenue sources that went into</p> <p>11 your calculation?</p> <p>12 A. Yes. There were -- it turns out that through the history, a</p> <p>13 large amount of funds, large for the time, predated 1887 in the</p> <p>14 form of annuities. In other words, Indians would give up their</p> <p>02:49:18 15 lands for an annuity, sometimes issued by the United States. So</p> <p>16 they were receiving annuity payments off of their lands in these</p> <p>17 sales.</p> <p>18 And so we documented a number of annuity payments, and</p> <p>19 we also documented a number of commutation of annuities, which</p> <p>02:49:40 20 means a lump sum paid in lieu of future payments.</p> <p>21 But we couldn't identify, A, a big enough universe to</p> <p>22 say that we captured them in any respect; and secondly, we</p> <p>23 really had no method of saying how much of those annuity</p> <p>24 payments were allocable to allotted lands.</p> <p>02:49:57 25 Q. And are there any other revenue sources that went into your</p> </div>

<div>1630</div> <div> <p>1 final calculation?</p> <p>2 A. Yes. A number, one of which is in the hard rock mineral</p> <p>3 category that is known as aggregates. And you and I would call</p> <p>4 them sand and gravel pits. And sand and gravel is a little bit</p> <p>02:50:22 5 unique in the sense that it is a very heavy commodity that uses</p> <p>6 large volumes for -- you know, the application generally is</p> <p>7 concrete.</p> <p>8 And so the transportation costs frequently usurp the</p> <p>9 cost of the material. So sand and gravel pits tend to be very</p> <p>02:50:45 10 local, so you can't say here's a sand and gravel pit that you</p> <p>11 can easily identify with individual Indian income. It turns out</p> <p>12 it's very difficult. They come and go in a matter of years, and</p> <p>13 we didn't have any reliable method of calculating that data.</p> <p>14 Q. But you did identify there was some revenue generated from</p> <p>02:51:07 15 that?</p> <p>16 A. Yes. And we attempted -- we -- when I say "we" at this</p> <p>17 point in time, Pincock Allen & Holt actually did a study and</p> <p>18 tried to estimate it, and determined post calculation that their</p> <p>19 methodology was not reliable.</p> <p>02:51:22 20 Q. And did you also look at water rights or judgment per capita</p> <p>21 accounts?</p> <p>22 A. Yes. Yeah, water rights are a big issue, as everyone knows</p> <p>23 in the west; they are a big issue for American Indians. We did</p> <p>24 a lot of research, and it turns out that it is determined by a</p> <p>02:51:45 25 court case, and I'm searching my memory. I believe it's 1911,</p> </div>	<div>1632</div> <div> <p>1 never were able to produce reliable data is contained in our</p> <p>2 other category.</p> <p>3 Q. And we'll discuss that other category in a little bit.</p> <p>4 I wanted to talk about some of the gaps in data. You</p> <p>02:53:39 5 said there were gaps in land leases and land sales. And were</p> <p>6 there gaps in other data that you collected, or was given to you</p> <p>7 by some of these experts?</p> <p>8 A. When we receive data from other experts, we do not</p> <p>9 presuppose any information that they don't give us.</p> <p>02:54:00 10 So yes, I did note very limitedly there were certain</p> <p>11 gaps in like the Questa data. I've observed them, but I</p> <p>12 wouldn't call them in any way significant.</p> <p>13 In other words, if they were able to identify the</p> <p>14 production value in a particular year but they couldn't identify</p> <p>02:54:22 15 the price reliable, they might leave price blank, which would</p> <p>16 come down in my model as zero, which I would take the production</p> <p>17 value times zero would equal zero.</p> <p>18 But those were very limited in nature.</p> <p>19 Q. So the gaps you had to deal with were essentially with the</p> <p>02:54:40 20 land sales and land leases, for the most part?</p> <p>21 A. Yes. We had two sets of what I would call gaps, and gaps</p> <p>22 means years where I didn't have any data in my model. And so we</p> <p>23 dealt with those gaps by virtue of what is, I think, called</p> <p>24 linear interpolation, or interpolation, and that means filling</p> <p>02:55:05 25 the gaps between two known points with -- and the vernacular</p> </div>
<div>1631</div> <div> <p>1 and the judge in that case was named Winters, and it became</p> <p>2 known as the Winters Doctrine.</p> <p>3 This is still -- my understanding of that is Indians</p> <p>4 obtained water rights with their land, but the water rights in</p> <p>02:52:04 5 essence inured to the benefit of the land. They couldn't sell</p> <p>6 their water rights to someone, for example, downstream.</p> <p>7 So we believe that most water rights inured to the</p> <p>8 benefit the lessee of a particular land, because it was able to</p> <p>9 be irrigated by virtue of the Indian right to water. But there</p> <p>02:52:27 10 could have been water rights that an Indian was able to sell to</p> <p>11 a third party independent of a land lease, and if so, we don't</p> <p>12 capture that.</p> <p>13 Q. And then also judgment and per capita?</p> <p>14 A. Yes. We clearly knew -- again, judgment and per capita data</p> <p>02:52:47 15 is available historically. It appears to us that there was sort</p> <p>16 of waves of litigation. Of the litigation we identified, most</p> <p>17 of it appeared to be filed on behalf of Tribal interests, and</p> <p>18 not individual interests.</p> <p>19 So I didn't know what amount of those revenues were</p> <p>02:53:12 20 allocable, again, to individual Indians in the Trust.</p> <p>21 Q. And so essentially, that is all the revenue sources you used</p> <p>22 to develop this model?</p> <p>23 A. Yes.</p> <p>24 Q. That you've explained so far?</p> <p>02:53:23 25 A. I mean, those ones that I have enumerated that were -- we</p> </div>	<div>1633</div> <div> <p>1 would be straight line data reconstruction.</p> <p>2 MR. GUILDER: Could we see Bates document 60-27-1,</p> <p>3 please?</p> <p>4 BY MR. GUILDER:</p> <p>02:55:18 5 Q. Have you seen this document, Mr. Fasold?</p> <p>6 A. Yes.</p> <p>7 Q. And did you review this in analyzing the defendants'</p> <p>8 throughput documents?</p> <p>9 A. Yes.</p> <p>02:55:31 10 MR. GUILDER: If we could turn to the --</p> <p>11 BY MR. GUILDER:</p> <p>12 Q. Well, last time you were on the stand, you testified about</p> <p>13 interpolation; there were some issues with that term,</p> <p>14 essentially, and the use of it. Is that correct?</p> <p>02:55:40 15 A. Yeah, that was most significantly on my cross-examination</p> <p>16 about how I did it and its reliability, yes.</p> <p>17 MR. GUILDER: If we could turn to page two of this</p> <p>18 document, and zoom in on the first highlighted section?</p> <p>19 BY MR. GUILDER:</p> <p>02:56:03 20 Q. And this is a NORC document, and it is essentially laying</p> <p>21 out some of the modeling assumptions that NORC took in their</p> <p>22 model.</p> <p>23 And the first, it characterizes as minor in effects.</p> <p>24 MR. GUILDER: Could we look at the next highlighted</p> <p>02:56:22 25 portion?</p> </div>

<p>1634</p> <p>1 BY MR. GUILDER:</p> <p>2 Q. And could you read that to yourself for a moment?</p> <p>3 A. (Witness complies.) Yes, I've read it.</p> <p>4 Q. So essentially what NORC is saying here is the minor in</p> <p>02:56:37 5 effects assumption is interpolation. Is that correct?</p> <p>6 A. Yeah, they typify -- they did similar things with their data</p> <p>7 and did exactly what I tried to describe, and that is</p> <p>8 interpolate between two known data points. And they typify</p> <p>9 minor in effects, is what this interpolation does.</p> <p>02:56:58 10 Q. And so now after you've done that interpolation, you</p> <p>11 essentially have the revenue data for the polygons. Is that</p> <p>12 correct?</p> <p>13 A. That's correct.</p> <p>14 Q. And what was the next process you had to take to establish</p> <p>02:57:13 15 what portion of that was allocable to individual Indians?</p> <p>16 A. Right. What we would have loved to have in each instance</p> <p>17 was not a polygon for each reservation, we would have loved to</p> <p>18 have had a polygon for each allottee's interest. But we don't</p> <p>19 have that. That data I'm not sure exists in any volume at all.</p> <p>02:57:40 20 So what we were forced to do is to say, we will take</p> <p>21 this revenue in a pro rata method, which is based upon the</p> <p>22 percentage of allottee interest to the total reservation</p> <p>23 interest --</p> <p>24 Q. Before you move fully to that, I wanted to talk about one</p> <p>02:58:03 25 thing you just mentioned. You said that if you could, you would</p>	<p>1636</p> <p>1 MR. GUILDER: If we could look at page 21, please? And</p> <p>2 if you could highlight in on that -- or zoom in on the</p> <p>3 highlighted portion?</p> <p>4 BY MR. GUILDER:</p> <p>02:59:30 5 Q. Could you read that to yourself for a moment?</p> <p>6 A. (Witness complies.) Yes, I've read it.</p> <p>7 Q. And this is essentially saying -- explaining the problems</p> <p>8 with not aligning the title realty to the actual tract</p> <p>9 information. Is that correct?</p> <p>02:59:55 10 A. Yes. It's a problem that they've recognized in this report.</p> <p>11 Q. And without something like that, you couldn't have the</p> <p>12 individual polygons of an individual allottee's land. Is that</p> <p>13 correct?</p> <p>14 A. No. I mean, I just look at it as data available to me to do</p> <p>03:00:12 15 my job the best way possible. It doesn't exist, and they're</p> <p>16 saying why this might not exist or be reliable.</p> <p>17 Q. Have you seen any other studies by BLM regarding some of</p> <p>18 these issues when you were preparing to decide how you were</p> <p>19 going to address this issue?</p> <p>03:00:26 20 A. And I couldn't quote the source, but I have read that there</p> <p>21 have been error rates up to the 20 percent range. And the other</p> <p>22 firsthand knowledge I have of this is one of the gentlemen from</p> <p>23 Farragut Systems, his name was Matt Gabriel, actually worked for</p> <p>24 the BIA, and he worked on GIS issues and he was describing to me</p> <p>03:00:56 25 the difficulties they had --</p>
<p>1635</p> <p>1 have polygons of individual Indian land. You mean each</p> <p>2 individual allottee's land?</p> <p>3 A. Yeah. I mean, it is certainly conceivable, and I believe</p> <p>4 the department has addressed it, where you could perform surveys</p> <p>02:58:22 5 of individual Indian lands, and that could be digitized. And</p> <p>6 then I would know, for example, exactly which wells were</p> <p>7 contained within the boundaries of an allottee's interest.</p> <p>8 MR. GUILDER: Could we look at Bates number 48-2-1,</p> <p>9 please?</p> <p>02:58:40 10 BY MR. GUILDER:</p> <p>11 Q. And have you looked at this document and can you identify</p> <p>12 it?</p> <p>13 A. Yes, I've looked at portions of this document. I have not</p> <p>14 read the entire document.</p> <p>02:58:50 15 Q. And you were just mentioning that if BLM had created</p> <p>16 essentially the GIS software but for individuals, and outlined</p> <p>17 their allotted lands, you could have done more essentially?</p> <p>18 MR. WARSHAWSKY: Objection, Your Honor. This is beyond</p> <p>19 the scope of the witness' expert opinion. He's now offering</p> <p>02:59:09 20 opinions about what he could have done if different things had</p> <p>21 happened.</p> <p>22 MR. GUILDER: He's actually not going to offer that</p> <p>23 opinion. He's going to explain why he chose a certain</p> <p>24 methodology.</p> <p>02:59:18 25 THE COURT: Overruled.</p>	<p>1637</p> <p>1 MR. WARSHAWSKY: Your Honor, I'm going to object as</p> <p>2 hearsay.</p> <p>3 THE COURT: Yeah, it is. It's even beyond the expert</p> <p>4 witness hearsay rule.</p> <p>03:01:05 5 But it's also lunchtime, and that's not hearsay. I'm</p> <p>6 taking judicial notice that it's 12:32, so it's lunchtime.</p> <p>7 MR. GUILDER: Thank you, Your Honor.</p> <p>8 (Recess taken at 12:32 p.m.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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